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Via Federal Express

July 29, 2004

Ms. Cathy A. Catterson, Clerk
US Court of Appeals for the Ninth Circuit
P.O. Box 193939
95 Seventh Street
San Francisco, CA 94119-3939

Re: *Tanadgusix Corporation, et al. v. Diedre Huber, et al.*
No. 02-36142

Dear Ms. Catterson:

Enclosed for filing in the above-captioned case is:

1. The original and three copies of Motion to Reopen the Record for Supplemental Briefing Regarding Transfer Documents or, in the Alternative, to Remand for Fact Finding, [Declaration of Thomas E. Bush Regarding Vessel Conditional Transfer Document, Declaration of Thomas P. Schlosser Regarding Document Withheld by James Jobkar and COS].

On July 7, 2004, this case was argued before Circuit Judges Hall, Kleinfeld and Wardlaw. Please conform the enclosed cover page and return it in the enclosed self-addressed stamped envelope. Thank you for your assistance.

Sincerely yours,

MORISSET, SCHLOSSER, JOZWIAK & McGAW



Nina Cordova
Legal Assistant

Enclosures

cc: Counsel of Record

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No. 02-36142

(District Court No. A02-0032 CV (JWS))

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TANADGUSIX CORPORATION, a native village corporation formed under the Alaska Native Claims Settlement Act, and BERING SEA ECCOTECH, INC., an Alaska Corporation and a wholly owned subsidiary of Tanadgusix Corporation,
Appellants,

v.

DIEDRE HUBER, Director, Property Management Division, General Services Administration, in her official capacity; STEPHEN A. PERRY, Administrator, General Services Administration, in his official capacity; HECTOR V. BARRETO, Administrator, Small Business Administration, in his official capacity; THE UNITED STATES OF AMERICA; JAMES JOBKAR, Alaska Department of Administration, Division of General Services, in his official capacity.
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Honorable Ralph R. Beistline

**MOTION TO REOPEN THE RECORD FOR SUPPLEMENTAL
BRIEFING REGARDING TRANSFER DOCUMENTS OR, IN THE
ALTERNATIVE, TO REMAND FOR FACT FINDING**

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Appellants Tanadgusix Corporation (“TDX”) and Bering Sea Eccotech (“BSE”) respectfully move the Court pursuant to Fed. R. App. P. 10(e) to reopen its record to permit consideration of a recently disclosed Vessel Conditional Transfer Document and Distribution Document that materially alter the facts of this case.

The newly disclosed Vessel Conditional Transfer Document, fully executed by TDX and the Alaska State Agency for Surplus Property (“SASP”), purports to transfer conditional title to the *Ex-Competent* to TDX, for use by BSE, as of October 24, 2000 – three months earlier than the January 19, 2001, Vessel Conditional Transfer Document previously available to the parties and the Court. The Distribution Document, also fully executed, contradicts an Affidavit previously submitted in this case.

Equity demands that the record be supplemented. The disclosure of these new Transfer Documents dramatically alters the factual basis of the district court’s decision and indicates that TDX acquired the drydock for use by BSE as part of its Small Business Administration § 8(a) Program, free from the use restrictions imposed by GSA’s surplus property donation scheme. At the very least, the disclosure of the October 24, 2000, Transfer Document creates a genuine issue of material fact as to which Vessel Conditional Transfer Document controls in this

matter. Justice requires reopening the record, or a remand to the district court, to fully flesh out the importance of the newly disclosed evidence.

ARGUMENT

I. THIS COURT PERMITS SUPPLEMENTATION OF THE RECORD.

This Court has the authority to exercise its equitable powers to supplement the record on appeal to permit consideration of new, material evidence surfacing after oral argument. For instance, recently, this Court permitted supplementation of the appeal record by newly discovered documents in order to correct material misstatements in the record. *Mangini v. United States*, 314 F.3d 1158, 1161 (9th Cir. 2003). The Court cited with approval the Eighth Circuit's decision in *Dakota Indu., Inc. v. Dakota Sportswear, Inc.*, 988 F.2d 61-62-64 (8th Cir. 1993), which recognizes the authority of the Court to permit supplementation of the record where justice so requires. *Mangini*, 314 F.3d at 1161; *see also Weiss v. Burr*, 484 F.2d 973, 989 (9th Cir. 1973), *cert. denied*, 414 U.S. 1161 (1974) (remanding case for consideration in light of transcript not presented to district court). The Court should exercise its equitable powers here to supplement the record with the newly discovered Vessel Conditional Transfer Document and Distribution Document.

A. The Alaska SASP Did Not Provide TDX With A Copy of the October 2000 Transfer Document Until Recently.

The October 2000, Vessel Conditional Transfer Document was unavailable to TDX below. As set forth in the attached declaration of Thomas Bush, counsel

for TDX in the related case of *U.S. ex rel. Pacific Shipyards Int'l v. TDX, et al.*, Civ. No. 01-00758 HG LEK (D. Hawaii), appellee James Jobkar only recently provided a copy of a fully executed Vessel Conditional Transfer Document conveying the *Ex-Competent* to TDX on October 24, 2000, pursuant to a Letter of Intent dated October 20, 2000. Bush Decl. ¶ 4. Interestingly, this disclosure occurred in a separate proceeding involving many of the same parties, rather than as part of the State's continuing responsibility to supplement discovery with newly discovered evidence in the above-captioned matter. *See* Fed. R. Civ. P. 26(e).

Despite TDX's discovery requests, document production below did not disclose the existence of the October 2000, Vessel Conditional Transfer Document. Schlosser Decl. ¶¶ 2-4. That the record is not complete is not the fault of the TDX and BSE. Fundamental fairness and judicial economy considerations warrant reopening the record or remanding for further findings of fact in light of this newly disclosed evidence.

B. The New Vessel Conditional Transfer Document is Material to this Case.

The October 2000, Transfer Document substantially alters the factual premises of the district court's decision. The Transfer Document and Letter of Intent heretofore considered are dated January 19, 2001. These documents may have been mooted by the previous conveyance of conditional title to the *Ex-Competent* to TDX, for use by BSE, on October 24, 2000.

The newly disclosed Vessel Conditional Transfer Document and referenced Letter of Intent are significant, and require reopening of the record, for a number of reasons. First, the Letter of Intent accompanying the October 24, 2000, Vessel Conditional Transfer Document makes clear the parties' understanding that the *Ex-Competent* would be used in Bering Sea Eccotech's Business Development Plan under the Small Business Administration § 8(a) Program. Schlosser Decl., Ex. 3. It makes no reference to moving the drydock except "from its current berthing in Pearl Harbor to a local dry dock within two weeks of acquiring the vessel." *Id.*

The October 2000 transfer to TDX for use by BSE entails far fewer restrictions on use of the donated property than were triggered by the January 2001, Transfer Document. A verified Small Business Act § 8(a) participant can use donated property where it sees fit and can borrow against the property, provided the use conforms to its SBA approved business plan. 15 U.S.C. § 636(j)(13); 13 C.F.R. § 124.405; *see also* ER 56-57 (excerpt from BSE's approved SBA business plan). Because the SBA program does not prohibit joint use of donated property nor limit use of the property to a particular state, the October 24, 2000, Vessel Conditional Transfer Document and attached Letter of Intent suggest that there is nothing unlawful about TDX's use of the drydock in Hawaii in partnership with Marisco.

Second, the October 24, 2000, Transfer Document likely moots the January 19, 2001, Transfer Document. As a threshold matter, the October 24, 2000, Transfer Document was first in time and there is no evidence to suggest that it was superseded. The October 24, 2000, Transfer Document was fully executed. There is nothing on the face of either Transfer Document suggesting that the October 2000, conditional transfer could have lapsed in the less than three months before the January 19, 2001, Transfer Document was executed. *See* Bush Decl., Ex. 1; ER 30-32. Likewise, nothing in the January 19, 2001, Transfer Document expressly or impliedly indicates that it was intended to supersede any prior executed Transfer Document. ER 30-32.

Third, the doctrine of after-acquired title suggests that the Alaska SASP's transfer of title to TDX must relate back to the first valid conveyance – the October 24, 2000, Transfer Document – and not the January 19, 2001, Transfer Document. The March 2001 Standard Form 123 authorized the Alaska SASP to transfer title. ER 40. That transfer of title should be deemed to have taken place pursuant to the first conveyance made by the Alaska SASP through the October 2000, Transfer Document. Subsequent conveyances have no effect because the Alaska SASP had nothing left to convey.

Fourth, the existence of the October 2000 Transfer Document gives greater context to, and suggests that there was nothing unlawful about, the October 24,

2000, Letter of Understanding between TDX and Marisco. Unaware of the October 2000, Vessel Conditional Transfer Document, the district court construed a Letter of Understanding between TDX and Marisco, also dated October 24, 2000, as an indication that the parties intended an arrangement contrary to paragraph 8 of the January 19, 2001, Vessel Conditional Transfer Document. However, in light of the October 24, 2000, Vessel Conditional Transfer Document which incorporated the intent to use the drydock in the SBA § 8(a) Program, it appears that the SASP, acting as GSA's agent, understood the BSE Business Development Plan to be consonant with the Vessel Conditional Transfer Document. As such, the factual premise for the district court's alternate ground for finding TDX in violation of the terms of the property donation – because TDX failed to maintain “full control” of the vessel based on the Letter of Understanding – is no longer valid. ER 256-257.

C. The Fully Executed State Agency Distribution Document is Material to this Case.

A State Agency Distribution Document, signed and dated by the authorized representative of the donee, and containing the terms prescribed by GSA, is a required part of the documentation for donation of vessels pursuant to 41 C.F.R. § 101-44.108-9 (b)(ii) (2001). In the district court, a SASP employee, Ken Browning, submitted an Affidavit stating that the dry dock was transferred through an attached Distribution Document, but he attached an unsigned document distributing the property to a different corporation, TDX Power, Inc. *See Alaska*

ER 11, 13. In his deposition on July 19, 2004, in *U.S. ex rel. v. TDX*, Mr. Browning testified that his Affidavit was false. Bush Decl. ¶ 8 and Ex. 2. Further, Mr. Browning identified another document as the correct and operative State Agency Distribution Document. *Id.*, and Ex. 3. Mr. Browning further admitted that the operative Distribution Document was provided to him on February 14, 2002, and that it was modified by TDX's representative, so that it was executed "as discussed," although he could not recall the content of the discussion. Bush Decl. ¶ 9.¹

Now it is clear that documents material to the transfer of the *Ex-Competent's* title remained shielded from the Court's review. The recent discovery of an earlier Vessel Conditional Transfer Document and a signed Distribution Document is extremely significant under the applicable GSA regulations. Under such circumstances, the interests of justice require a judicial determination of which set of documents apply to the transfer of the *Ex-Competent*.

CONCLUSION

In cases like this one, where the rights of the parties are governed by documents specified in the agency's regulations, 41 C.F.R. § 101-44.108-9 (b) (2001), the need to present the reviewing court with a complete record of all the

¹ Mr. Browning also testified that while he knew that GSA regulations governing the transfer of the *Ex-Competent* required the Alaska SASP to submit a letter to GSA that set forth its evaluation of TDX's ability to use the vessel for the purpose stated in its Letter of Intent, he did not do so. Bush Decl. ¶ 9.

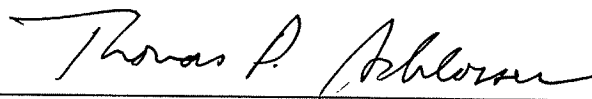
documents at issue is paramount. TDX respectfully requests the Court supplement the record to consider these new Transfer Documents in light of the material already in the record. Because of the Court's focus on the January 19, 2001, Vessel Conditional Transfer Document at argument and the subsequent dramatic disclosure of the October 24, 2000, Vessel Conditional Transfer Document by defendant James Jobkar and the Alaska SASP, the Court should reopen the record to consider the operative Transfer Documents. The Court may also wish to invite brief submissions concerning their significance.

In the alternative, TDX asks that the Court vacate the decision below and remand this matter to the district court for consideration of the newly disclosed material evidence.

Dated this 29th day of July, 2004.

Respectfully Submitted,

MORISSET, SCHLOSSER, JOZWIAK & McGAW



Thomas P. Schlosser, WSBA # 6276
Attorneys for Plaintiffs Tanadgusix Corporation
and Bering Sea Eccotech, Inc.

No. 02-36142
(District Court No. A02-0032 CV (JWS))

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TANADGUSIX CORPORATION, a native village corporation formed under the Alaska Native Claims Settlement Act, and BERING SEA ECCOTECH, INC., an Alaska Corporation and a wholly owned subsidiary of Tanadgusix Corporation,
Appellants,

v.

DIEDRE HUBER, Director, Property Management Division, General Services Administration, in her official capacity; STEPHEN A. PERRY, Administrator, General Services Administration, in his official capacity; HECTOR V. BARRETO, Administrator, Small Business Administration, in his official capacity; THE UNITED STATES OF AMERICA; JAMES JOBKAR, Alaska Department of Administration, Division of General Services, in his official capacity.
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
Honorable Ralph R. Beistline

ATTACHMENTS TO
MOTION TO REOPEN THE RECORD FOR SUPPLEMENTAL
BRIEFING REGARDING TRANSFER DOCUMENTS OR, IN THE
ALTERNATIVE, TO REMAND FOR FACT FINDING

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Attachments

Tanadgusix Corporation and Bering Sea Eccotech, Inc.'s Motion to Reopen the Record for Supplemental Briefing Regarding Transfer Documents, or in the Alternative, to Remand for Fact Finding

<u>Document</u>	<u>Date</u>	<u>Tab No.</u>
Thomas E. Bush Declaration		
Ex. 1 – Vessel Conditional Transfer Document	10/24/00	1
Ex. 2 – Kenneth Browning Deposition	07/19/04	2
Ex. 3 – Distribution Document	02/14/02	3
Thomas P. Schlosser Declaration		
Ex. 1 – James Jobkar Letter	01/10/02	1
Ex. 2 – George Freeman Letter	07/31/02	2
Ex. 3 – TDX Letter of Intent	10/20/00	3

No. 02-36142

(District Court No. A02-0032 CV (RRB))

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TANADGUSIX CORPORATION, a native village corporation formed under the Alaska Native Claims Settlement Act, and BERING SEA ECCOTECH, INC., an Alaska Corporation and a wholly owned subsidiary of Tanadgusix Corporation,
Appellants,

v.

DIEDRE HUBER, Director, Property Management Division, General Services Administration, in her official capacity; STEPHEN A. PERRY, Administrator, General Services Administration, in his official capacity; HECTOR V. BARRETO, Administrator, Small Business Administration, in his official capacity; THE UNITED STATES OF AMERICA; JAMES JOBKAR, Alaska Department of Administration, Division of General Services, in his official capacity.

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
Honorable Ralph R. Beistline

**DECLARATION OF THOMAS E. BUSH REGARDING
VESSEL CONDITIONAL TRANSFER DOCUMENT**

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1. I am counsel for Tanadgusix Corporation in *United States ex rel. Pacific Shipyards Int'l v. Tanadgusix Corp. and Marisco Ltd*, No. 01-00758 HG LEK (D. Hawaii) (hereinafter "*U.S. ex. rel v. Tanadgusiz Corp*").

2. In connection with notifying the parties and preparing for the depositions of James Jobkar and Kenneth Browning of the State of Alaska, Department of Administration, Division of General Services, State Agency for Surplus Property ("SASP"), I caused to be served upon the SASP a subpoena duces tecum encompassing documents relating to the drydock *Ex-Competent* or TDX.

3. In June 2004, James Jobkar, as the custodian of records for the SASP, provided to me copies of their documents, and our staff bates stamped those documents with a series "D" followed by six digits.

4. Included in the documents provided to me by the SASP is the October 24, 2000 Vessel Conditional Transfer Document which is attached as Ex. 1. This document was assigned the number Ex. 20 in the deposition of Mr. Browning taken on July 19, 2004 and July 20, 2004 and discussed by the witness therein.

5. During the week of July 19, 2004, I learned that the October 24, 2000 Vessel Conditional Transfer Document provided to me in June 2004 had not been provided to Thomas P. Schlosser, counsel for Tanadgusix Corporation ("TDX") and Bering Sea Eccotech ("BSE") Inc., appellants in this proceeding.

6. I understand that in this proceeding, James Jobkar submitted as evidence to the district court the Affidavit of Ken Browning, who was Mr. Jobkar's subordinate and identified himself as the "Federal Property Allocation Manager" for the Alaska SASP and that in his affidavit Mr. Browning testified that the *Ex-Competent* "was transferred to TDX through the GSA Donation Program on July 5, 2001" and identified Exhibit B to his affidavit as the operative State Agency Distribution Document. AK ER 11.

8. In his deposition on July 19, 2004 in *U.S. ex rel. v. TDX*, Mr. Browning, who was represented by counsel for the State of Alaska (who also represents Mr. Jobkar in this proceeding), testified that his affidavit was false. First, he testified that the document he had identified as the operative State Agency Distribution Document in his affidavit was the wrong document. *See* Ex. 2, Browning Depo at 172:5-15. In his deposition, he identified another document, marked as Ex. 32 to his deposition, as the correct and operative State Agency Distribution Document. *Id.* at 173:7-174:17. A true and correct copy of the deposition Ex. 32 is attached as Ex. 3.

9. Mr. Browning admitted that deposition Ex. 32 was, according to fax notation on the exhibit, provided to him on February 14, 2002. *See* Ex. 2 at 218:1-13. He also admitted that this document was modified by TDX's representative so it was executed "as discussed", though he could not recall the content of the

discussions. *Id.* at 174:18-176:25. He further admitted that he knew conditional title to the drydock did not transfer to TDX until it had executed the State Agency Distribution Document. *Id.* at 122:1-9.

9. In his deposition, Mr. Browning also testified that while he knew that GSA regulations governing the transfer of the *Ex-Competent* required the Alaska SASP to submit a letter to GSA that set forth its evaluation of TDX's ability to use the vessel for the purpose stated in its letter of intent, but that he failed to submit such a letter because GSA never asked for one. *Id.* at 184:21-185:25.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

EXECUTED July 28, 2004.



Thomas E. Bush

20

VESSEL CONDITIONAL TRANSFER DOCUMENT

KNOW ALL MEN BY THESE PRESENTS: That the United States of America (hereinafter) called the General Services Administration (GSA) acting by and through the State of Alaska, State Agency for Surplus Property (hereinafter called the SASP) pursuant to the powers and authority contained in the Federal Property and Administrative Services Act of 1949 (63 Stat. 377), as amended for and in consideration of and in reliance upon the representations of Tanadgusix (TDX) Corporation whose address is P.O. Box 88, St. Paul Alaska 99660-0088, (herein after called the Donee) that the Property hereinafter described is required in the furtherance of the Donee's program and that such Property will be used solely in connection with such programs and more specifically for all the following purpose(s) and plan as set forth in the Donee's "Letter of Intent" dated October 20th, 2000 which Expression of Interest is hereby incorporated herein and made a part hereof, and for no other purposes, does hereby deliver, sell, assign, and transfer all of its rights, title and interest in and to the following described vessel:

"AFDM 6, Ex-Competent"

together with all appurtenances, and accessories attached thereto or installed therein, (all of which are hereinafter referred to as the Property), which has been determined by GSA to have a fair market value of \$5,187,000.00 unto the Donee to have and to hold the said Property, all and singular forever, this donation being made on an "as is, where is" basis without warranty of any kind, and delivery is made at the present location of the Property regardless of where the same may be situated or the condition thereof;

SUBJECT, HOWEVER, to the following conditions and restrictions:

1. The Donee agrees to obtain documentation of the vessel under the applicable laws of the United States and regulations promulgated thereunder and the applicable laws of the several States governing the documentation of said Property and at all times to maintain such documentation. Upon written request and sufficient evidence to justify such action, GSA may waive the requirement for documentation in the case of donated vessels which are to be permanently moored on land and never to be used again on the waterways.
2. The Donee agrees to record this Vessel Conditional Transfer Document with the Coast Guard Documentation Officer at the port of documentation of the Property within 30 days after the receipt of the full-executed Vessel Conditional Transfer Document. If documentation is waived under (1), above, the requirement for registration may also be waived.
3. The Property shall be placed in use for the purpose stated above no later than 12 months after acquisition thereof and used for that same purpose for a 12-month period thereafter.
4. There shall be a further period of restriction beginning on the date the Property has been used for the period prescribed in (3), above. This period will expire after the Property has been used for the purpose stated above for an additional period of 48 months. During this additional period of restriction, the Property shall be used only for the purpose(s) stated above.
5. In the event the Donee does not record this Vessel Conditional Transfer Document with the Coast Guard Documentation Officer at the port of documentation of the Property within 30 days after the date of receipt of the fully executed Vessel Conditional Transfer Document, or in the event the Property is not placed in use within 12 months of receipt and used for a 12-month period thereafter, the Donee shall within 30 days after the date on which the instrument should have been recorded, or within 30 days after the Property has ceased to be used, provide notice thereof, in writing to the SASP, and at the Donee's expense return such Property to the SASP or otherwise make the Property available for transfer, provided the Property is still usable as

determined by the SASP, or otherwise dispose of the Property through the SASP as may be direct by GSA.

6. In the event the Property is not so used or handled as required by (1), (2), (3) (4) and (5) above, title and right to the possession of the Property shall, at the option of the GSA, revert to the United States Government. Upon demand the Donee shall, as directed by the GSA through the SASP, release the Property to such person or agency as may be designated, sell the Property, or otherwise dispose of the Property. Any sale shall be for the benefit and account of the United States Government.

7. During the periods of restriction prescribed in (3) and (4), above, the Donee shall make reports to the SASP on the use, condition, and location of the Property and on other pertinent matters as may be required from time to time by the SASP or GSA.

8. During the periods of restriction prescribed in (3) and (4), above, the Donee shall not sell, trade, lease, lend, bail, cannibalize, encumber, or otherwise dispose of the Property, or remove it permanently for use outside the State, without the prior written approval of GSA. The proceeds from any sale, trade, lease, loan, bailment, encumbrance, or other disposal of the Property during the period of restriction set forth in (3) and (4), above, when such action is authorized in writing by GSA, shall be for the account of the United States Government.

9. In the event, during the periods of restriction prescribed in (3) and (4), above, the Property is sold, traded, leased, loaned, bailed, cannibalized, encumbered, or otherwise disposed of without prior written approval of GSA, or is used for a purpose(s) other than the purpose(s) stated, the Donee at the option of GSA shall, be liable for the proceeds of the disposal, the fair market value, or the fair rental value of the Property at the time of such unauthorized transaction or use, as determined by GSA.

10. If at any time, from the date the Donee receives the Property through the periods of restriction prescribed in (3) and (4), above, the Property is no longer suitable, usable, or required by the Donee for the purpose for which required, the Donee shall promptly notify the SASP, and shall, as directed by the GSA through the SASP, return the Property to the SASP, transfer the Property to another Donee or another State Agency, or to a department or agency of the United States, sell the Property, for the account and benefit of the United States with the proceeds remitted promptly to GSA from the donee, or otherwise dispose of the Property as directed by GSA.

11. At the option of GSA, the Donee may obtain abrogation of the terms and conditions set forth in (4) and (6) through (10), above, by payment of an amount determined by and with the written concurrence of GSA.

12. GSA may waive any or may terminate all of the terms and conditions set forth in (4) and (6) through (10), above, and give unrestricted title to the Property in favor of the Donee whenever such action is determined in writing by GSA to be appropriate.

13. The Donee agrees to hold harmless and indemnify the Government for any and all cost, judgment, action, debit, liability costs and attorney's fees or any other request for monies of any type of relief arising from or incident to the transfer, donation, use processing, disposition, or any subsequent operation performed upon, exposure to or contact with any component, part, constituent or ingredient of the item, material or substance, whether international or accidental.

14. The Donee is aware that the item(s) listed as containing Polychlorinated Biphenyls (PCB's), a toxic environmental contaminate, require(s) special handling and disposal in accordance with U.S. Environmental Protection Agency Regulations (40 CFR part 761) and U.S. Department of Transportation regulations codified in 49 CFR parts 171-180. The Donee certifies that this item will be handled and disposed of in accordance with applicable Federal statutes and regulations and applicable State laws.

D 000072

IN WITNESS WHEREOF, the Donor and the Donee have duly executed this instrument this 24 day of October, 2000.

United States of America, Acting by and through the
Alaska State Agency for Surplus Property

By [Signature]
Title YAO

Donee:
By Ron Philym
Title CHAIRMAN / CEO

Institution or Organization

TANADGUSIK (TPX) Corporation

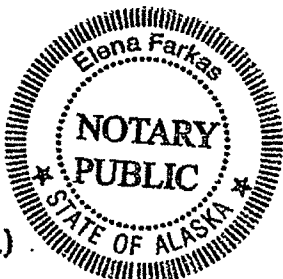
Notarization of State Agency Certification:

CITY of Anchorage
COUNTY of _____
STATE of Alaska

On this 24 day of Oct, 2000, before me appeared Kenneth Browne, to me personally known, who, being by me duly sworn, says that she/he is the person who executed the foregoing instrument and that such instrument was executed under duly delegated authority on behalf of the Alaska State for Surplus Property, and acknowledged the foregoing instrument to be the free act and deed of the State of Alaska.

Donee _____ Date _____

Given under my hand and official seal the day and year above written.



(SEAL)

My Commission Expires: _____
My Commission Expires December 28, 2003

Elena Farkas
Notary Public in and for the
City of Anchorage
County of _____
State of Alaska

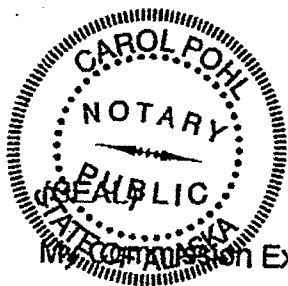
D 000073

Notarization of Donee Certification:

CITY of _____
COUNTY of _____
STATE of Alaska

On this 04 day of October, 20 00, before me
appeared Ron Philemonoff, to me personally known, who, being by me
duly sworn, says that she/he is the person who executed the foregoing instrument on behalf of
said Tanadgusix Corporation, and acknowledges to me that
she/he was duly authorized to execute the foregoing instrument and that he executed the same
as a free act and deed of said Organization.

Given under my hand and official seal the day and year above written.



Carol Pohl
Notary Public in and for the
City of Anchorage
County of _____
State of Alaska

D 000074

IN THE UNITED STATES DISTRICT COURT
STATE OF HAWAI'I

UNITED STATES OF AMERICA, ex)
rel. PACIFIC SHIPYARDS
INTERNATIONAL, LLC) NO. A01-00758 HG LEK

Plaintiff,)
vs.)

TANADGUSIX CORPORATION and
MARISCO. LTD.,)

Defendants.)

SELECTED PAGES FROM
VIDEOTAPED DEPOSITION OF KENNETH ALAN BROWNING
VOLUME 1 of 2
Pages 1 through 263

Taken at:
Turner & Mede
1500 West 33rd Avenue, Suite 200
Anchorage, Alaska 99503

Date taken:
July 19, 2004
10:30 a.m.

Reported by:
Sandra M. Mierop, CSR, CRR, CCP

1 A P P E A R A N C E S:

2 UNITED STATES DEPARTMENT OF JUSTICE
3 601 D Street, N.W., Room 9705-PHB
Washington, D.C. 20004

By: JEFFREY M. COHEN

4 LOUIS J. VIRELLI III

For the United States of America

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12 For Marisco, Ltd.

(808) 523-9316

13 freedlaw@hawaii.rr.com

14 ALSTON HUNT FLOYD & ING

18th Floor, American Savings Bank Tower

15 1001 Bishop Street

Honolulu, Hawaii 96813

16 By: THOMAS E. BUSH

For Tanadgusix Corporation

17 tbush@ahfi.com

18 ALASKA OFFICE OF THE ATTORNEY GENERAL

Governmental Affairs Section

19 Diamond Courthouse, 4th Floor

Juneau, Alaska 99811

20 By: MARJORIE VANDOR

For Kenneth Browning and Jim Jobkar

21 (907) 465-3600

22 VIDEOGRAPHER:

Steve Miedzwiadok

23 Northern Lights Realtime & Reporting, Inc.

I N D E X

WITNESS

EXAMINATION

KENNETH ALAN BROWNING

BY MR. BUSH

9

1 Q. Okay. Under the regs in effect at the
2 time, title transferred when TDX took
3 position -- took possession and signed the state
4 distribution document, correct?

5 A. Yes, conditional title.

6 Q. Conditional title transfers at that
7 time?

8 A. Yes.

9 Q. Okay.

10 MR. BUSH: I'm going to show you
11 a document that we'll have marked as Exhibit
12 22 -- I'm sorry. Did I already mark something
13 as 22? Oh, I'm sorry.

14 23, then. Thank you for
15 correcting me.

16 (Exhibit No. 23 marked.)

17 Q. (BY MR. BUSH) This is a document from
18 your files that was -- that's signed by Jim
19 Jobkar. And do you recall this document -- oh,
20 I'm sorry. You're not looking at it.

21 Now that you got it in front of
22 you, do you recall this?

23 A. Yes.

24 Q. Okay. And did you draft this for
25 Mr. Jobkar?

1 it.

2 Q. And this informs you that TDX Power,
3 Inc. was an 8(a) firm, right?

4 A. Yes.

5 Q. Okay. Now, going back to your
6 affidavit, which is Exhibit 5, if you look at
7 Exhibit B, which is the distribution document to
8 TDX Power, this document was never signed by
9 TDX, correct?

10 A. No, I don't -- this one here that I
11 have is not signed by TDX.

12 Q. Well, isn't it correct that TDX
13 never -- TDX Power, Inc. never signed any
14 distribution document for the EX-COMPETENT?

15 A. Yeah, that's correct.

16 Q. Isn't it correct, in fact, that this
17 distribution document that you attached to your
18 affidavit to TDX Power was never even provided
19 to TDX, correct?

20 A. I don't know.

21 Q. You don't know that?

22 A. Yeah, I -- I don't know. I don't
23 recall.

24 Q. Now, you did provide a distribution
25 document to TDX that -- that was signed by

1 Mr. Kennedy, correct?

2 A. Yes.

3 Q. Did Mr. Cohen show you that one
4 yesterday?

5 A. I -- I don't know. I'll have to look
6 at it. I've seen it. So I don't know.

7 (Exhibit No. 32 marked.)

8 Q. (BY MR. BUSH) Now, this is a
9 distribution document that Kevin -- that you
10 provided to TDX, and that Mr. Kennedy signed,
11 correct?

12 A. Yes.

13 MR. FREED: What's the exhibit
14 number?

15 THE WITNESS: 32.

16 MR. BUSH: 32.

17 MR. FREED: I must have been
18 asleep at the switch.

19 Q. (BY MR. BUSH) Now, this one is --
20 where it says "checked by" and it says Ken B.
21 That's you, right?

22 A. Yes.

23 Q. And in the upper right-hand corner,
24 there's a date of July 5th, 2001?

25 A. Yes.

1 Q. That's the date this would have been
2 printed out?

3 A. Yes.

4 Q. And when was this provided to
5 Mr. Kennedy?

6 A. I don't see where he put a date on it,
7 so it had to have been after July 5th of 2001.
8 On or after.

9 Q. Is this the distribution document that
10 effects the transfer of the EX-COMPETENT?

11 MS. VANDOR: Could we clarify if
12 it's this or a copy of this, please?

13 MR. BUSH: I'm sorry.

14 Q. (BY MR. BUSH) Is the copy -- is this a
15 copy of the distribution document that effects
16 the transfer of the EX-COMPETENT?

17 A. Yes.

18 Q. Now, if you look at Exhibit 32, which
19 you've just identified as the effective
20 distribution document, you state there -- or a
21 copy of the effective distribution document.
22 You state there that -- I'm sorry, you don't
23 state there, but do you see Mr. Kennedy lined
24 out some words there on the certification?

25 A. Yes.

1 Q. And he wrote: As discussed, KK. Do
2 you see that?

3 A. Yes.

4 Q. Did you have any discussions with
5 Mr. Kennedy about why he lined that out?

6 A. No. Not that I recall.

7 Q. Where he says "as discussed," do you
8 know what he's talking about?

9 A. What has to be talked about here -- I
10 don't recall a conversation, because this is
11 three or four years ago. But the stuff here,
12 what's crossed off, is talking about the
13 certifications and terms and conditions on the
14 back of the distribution document, which this
15 does not have because they don't apply to this
16 transfer. And so possibly we discussed the
17 Conditional Transfer Document because that's
18 what applies. So, I -- I -- I don't recall.
19 Just looking at it, that's what I'd say.

20 Q. That's what you would say?

21 A. Looking at it, yes.

22 Q. Okay. And this came from your files,
23 and do you know where the back side is? It
24 wasn't produced.

25 A. The -- I -- I don't know. There's --

1 I know -- I know that a back side of -- a
2 distribution document was provided to you.
3 They're all the same.

4 Q. Okay. And didn't Mr. Kennedy discuss
5 with you that he was lining out the back side of
6 the distribution document or making marks to it?

7 MS. VANDOR: Objection.
8 Speculation.

9 A. I don't recall. The back side of the
10 distribution document does not apply to this
11 transfer. So...

12 Q. (BY MR. BUSH) Did Mr. Kennedy explain
13 to you that he was -- that he was lining out the
14 back side because of concerns that restrictions
15 concerning the site of the EX-COMPETENT that he
16 had. That is, that he didn't want to be bound
17 by signing this to having to keep it in or
18 having to take it to Alaska?

19 A. I don't recall that conversation.

20 Q. So, you basically don't recall any
21 conversation where he says "as discussed,"
22 whatever that refers to?

23 A. Yeah, yeah. Whatever that refers to,
24 no.

25 Q. All right.

1 break, that's fine.

2 Michael, we're taking a break.

3 MR. FREED: Is this going to be a
4 ten-minute one?

5 MS. VANDOR: No. I have to make
6 a phone call, though.

7 MR. BUSH: Ms. Vandor has to make
8 a call.

9 MR. FREED: Well, just tell me
10 how many minutes.

11 MS. VANDOR: Three.

12 MR. BUSH: Three minutes.

13 MR. FREED: I shall return.

14 MS. VANDOR: Okay.

15 THE VIDEOGRAPHER: Going off the
16 record at 4:30 p.m.

17 Stand by.

18 (Break.)

19 THE VIDEOGRAPHER: Stand by.

20 We're on the record at 4:42 p.m.

21 Q. (BY MR. BUSH) Okay. Mr. Browning, in
22 addition to the letter of intent, Vessel
23 Conditional Transfer Document, the distribution
24 document, and the standard form 123, don't the
25 Federal regulations also require that a letter

1 signed and dated by the state agency director
2 confirm and certify the applicant's eligibility
3 and contain that state agency's evaluation of
4 the applicant's ability to use the vessel for
5 the purpose stated in its letter of intent and
6 any other supplemental information concerning
7 the needs of the donee which supports making the
8 allocation?

9 MS. VANDOR: Objection. Could
10 you please give him the cite that you're reading
11 from?

12 MR. GRISWOLD: I object. It
13 calls for a legal conclusion.

14 Q. (BY MR. BUSH) Can you answer my
15 question?

16 A. They did not request it.

17 Q. Who is "they"?

18 A. GSA.

19 Q. You understand that under the regs
20 that's -- the regs call for that letter?

21 A. Yes.

22 Q. Okay. And if the GSA had requested
23 such a letter, you would have provided one,
24 correct?

25 A. Yes.

1 recall when you got -- let's get back to the
2 document number for the distribution document.

3 And I think that's 30 --

4 A. -- 5 or something.

5 MR. VIRELLI: 2. I think.

6 Q. (BY MR. BUSH) 32.

7 Do you know when you got back
8 this signed version?

9 A. No.

10 Q. Do you know how you got it back?

11 A. Looks like fax.

12 Q. What's the date of the fax?

13 A. February 14th of '02.

14 Q. Okay. Is that the date you got it
15 back?

16 A. I -- I don't know.

17 Q. At the time -- at the -- do you recall
18 having conversations with Mr. Kennedy about the
19 distribution document? That's Exhibit 32?

20 A. I -- I don't recall. What
21 conversations?

22 Q. About him signing it or not signing
23 it?

24 A. I remember asking, it seems like, if
25 he had signed it and sent it to us or something

1 like that. I asked where the signed one was.

2 Q. And what was his response?

3 A. I don't remember. I don't recall.

4 Q. Why did you -- what caused you to ask
5 him whether he had signed one?

6 A. I don't remember.

7 Q. At -- at the time you asked him, you
8 were aware that there was a dispute that TDX, at
9 least, had regarding the drydock in Hawaii,
10 whether they would have to leave it there or
11 whether they would move it someplace else?

12 MR. VIRELLI: Objection.

13 Foundation.

14 MS. VANDOR: Objection.

15 A. I -- it -- I don't know. It depends
16 on -- you know, we're back to dates. So, I
17 don't know.

18 Q. (BY MR. BUSH) Well, by February 2002,
19 you were aware there was a dispute, right?

20 A. Okay. I must have been, because this
21 came in later. January. Yes.

22 Q. Did you ever have a -- a thought as to
23 whether it would be wise to have TDX execute a
24 distribution document given their position
25 regarding the drydock having to stay in Hawaii?

Dept. of General Services
State Agency for Surplus Property
Form No. OSSP-3 (Rev 1-92)

Distribution Document

STATE AGENCY FOR SURPLUS PROPERTY
2400 VIKING DRIVE
ANCHORAGE, ALASKA
PHONE (907) 279-0596 FAX (907) 278-0352

Document Number
25799

Date: 07/05/2001

Page 1

BILL TO:

TANADGUSIX CORPORATION, DBA TOX POWER
4300 B STREET, SUITE 402
ANCHORAGE, AK 99503

REPRESENTATIVE:
KEVIN KENNEDY

SHIP TO:
address SAME

telephone

purchase order #

billing code

() PICK UP () SHIP () WILL CAL

I.D. number	Description	Serial Number	Quantity	Unit of Issue	Unit Charges	FOR STATE AGENCY USE ONLY		
						Total charges	Take (v) Ship (X)	Unit acquisition cost
1-0002 01	COMPETENT AFDM 6		1	EA	200,000.00	200,000.00		5,187,000.00

The above property shall be placed in use for the purpose for which acquired no later than 12 months after acquisition and used for a period of 18 months. In the event the above property is no longer needed during the 18 months of required use, the donee, within 30 days of either occurrence, shall notify the State Agency in writing that the property has not been placed in use or no further need exists. Prior approval must be obtained from the State Agency before an item with an acquisition cost of \$5,000.00 or more, or a titled vehicle or boat, may be disposed of, cannibalized for component parts, or dismantled for secondary utilization.

Subtotal	200,000.00
Tax	0.00
Delivery	0.00
Total Amount Due	200,000.00

Page 1

Checked by: KEN B

(Customer service agent)

Received only those items marked Take (v) or ship (x)

Signature of person receiving items marked (v) *[Signature]* Date _____
Items delivered by: _____ Date _____
[] State truck [] Commercial
Signature of person receiving items marked (x) _____ Date _____

Item(s) number _____ above approved for cannibalization/secondary utilization by: _____

CERTIFICATION

Using the duly authorized agent of the above donee, I accept this property listed hereon and commit the donee to the certification, terms, and conditions printed on the reverse side of this document. As of 2/14/02

Signature of State Agency representative *[Signature]* Date _____
TDX Rep

P.02

FAX NO. 18072704978

CC-000504

FEB-14-02 THU 12:22

TUX007-2410

Ex. 3, p. 1

No. 02-36142

(District Court No. A02-0032 CV (RRB))

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TANADGUSIX CORPORATION, a native village corporation formed under the Alaska Native Claims Settlement Act, and BERING SEA ECCOTECH, INC., an Alaska Corporation and a wholly owned subsidiary of Tanadgusix Corporation,
Appellants,

v.

DIEDRE HUBER, Director, Property Management Division, General Services Administration, in her official capacity; STEPHEN A. PERRY, Administrator, General Services Administration, in his official capacity; HECTOR V. BARRETO, Administrator, Small Business Administration, in his official capacity; THE UNITED STATES OF AMERICA; JAMES JOBKAR, Alaska Department of Administration, Division of General Services, in his official capacity.

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
Honorable Ralph R. Beistline

**DECLARATION OF THOMAS P. SCHLOSSER REGARDING
DOCUMENT WITHHELD BY JAMES JOBKAR**

Thomas P. Schlosser, WSBA #6276
Rob Roy Smith, WSBA #33798
Morisset, Schlosser, Jozwiak & McGaw
1115 Norton Building
801 Second Avenue
Seattle, WA 98104-1509
Telephone: (206) 386-5200
Facsimile: (206) 386-7322

1. I am counsel for Tanadgusix Corporation (“TDX”) and Bering Sea Eccotech (“BSE”) Inc., appellants in this proceeding.

2. In January 2002, I made a request pursuant to the Alaska Public Records Act for all documents of the State of Alaska, Department of Administration, Division of General Services, State Agency for Surplus Property (“SASP”), that refer in any way to the *Ex-Competent* and to TDX or BSE. Attached as Ex. 1 is the January 10, 2002 letter of Appellee Jim Jobkar purporting to provide all such documents. However, the October 24, 2000 Vessel Conditional Transfer Document was not among the documents provided.

3. In July 2002, I arranged with counsel for Mr. Jobkar, Marjorie L. Vador, to have TDX’s local counsel, George T. Freeman, review and copy all documents of the SASP concerning the *Ex-Competent*, TDX or BSE, within the scope of the Parties’ Planning Meeting for Pre-Discovery Disclosures and Discovery Plan. Attached as Ex. 2 is the July 31, 2002 letter of Mr. Freeman describing the procedure he used in making a numbered copy of the SASP files provided. However, the October 24, 2000 Vessel Conditional Transfer Document was not among the documents produced at that time.

4. Despite the two requests to the SASP for production of documents described above, I had no knowledge of the existence of the October 24, 2000 Vessel Conditional Transfer Document until the week of July 19, 2004, when

counsel in a related case, Mr. Thomas Bush, discovered that it had been provided to him by the SASP in June 2004, without having been previously provided to me despite my prior requests.

5. The TDX Letter of Intent, dated October 20, 2000, which is referenced and incorporated in the October 24, 2000 Vessel Conditional Transfer Document attached to Mr. Bush's declaration is Ex. 19 to the Declaration of Kevin Kennedy dated June 26, 2002, District Court Docket No. 18. A copy of that letter is attached as Ex. 3.

6. On July 28, 2004, I contacted Mr. Thomas Bondy, attorney for Appellee United States, and I also contacted an assistant to Marjorie Vandor, attorney for Appellee James Jobkar. I informed both attorneys of my intention to file a Motion to Reopen the Record for Supplemental Briefing Regarding Transfer Document or, in the Alternative, to Remand for Fact Finding, and I asked each attorney to inform me of their position concerning this motion. On the same day, I transmitted a copy of the October 24, 2000 Vessel Conditional Transfer Document and October 20, 2000 Letter of Intent to both Mr. Bondy and Ms. Vandor. Mr. Bondy has advised me that they will file an opposition to this motion. Ms. Vandor has indicated that she will likely oppose the motion.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

EXECUTED July 29, 2004, at Seattle, Washington.

A handwritten signature in cursive script, reading "Thomas P. Schlosser". The signature is written in dark ink and is positioned above a horizontal line.

Thomas P. Schlosser

STATE OF ALASKA

DEPARTMENT OF ADMINISTRATION DIVISION OF GENERAL SERVICES

TONY KNOWLES, GOVERNOR
Property Management Office
2400 Viking Drive
Anchorage, Alaska 99501
TEL: (907) 279-0596/276-3320
FAX: (907) 278-0352/278-4976

January 10, 2002

Thomas P. Schlosser, Esq.
Morriset, Schlosser, Ayer & Jozwiak
1115 Norton Building
801 Second Avenue
Seattle, WA. 98104

RECEIVED


JAN 22 2002

MORISSET, SCHLOSSER, AYER & JOZWIAK
SEATTLE OFFICE
~~OVERNIGHT MAIL HAND DELIVERED~~

Dear Mr. Schlosser,

The attached documents are in response to your letter of January 9, 2002 requesting under AS 40.25 documents from our files that refer in any way to the Ex-Competent and TDX or BSE. If you have any questions please call me.

Sincerely,


Ken Browning
for Jim Jobkar

GEORGE T. FREEMAN
Attorney
1152 P Street
Anchorage, Alaska 99501
907-274-8497

RECEIVED

AUG 05 2002

July 31, 2002

MORISSET-SCHLOSSER, JOZWIAK & MCGAW
SEATTLE OFFICE
[] OVERNIGHT [] AIR MAIL [] HAND DELIVERED

Ken Browning
State Agency for Surplus Property
State of Alaska
2400 Viking Drive
Anchorage, Alaska 9950

Re: TDX v. Huber et al., A02 032 CIV (JWS)
Review and Copying of Files

Dear Mr. Browning:

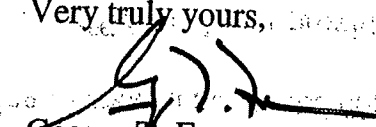
This letter confirms my review of files at your office. My co-counsel Tom Schlosser contacted Margorie Vandor about reviewing the files at your office. I then spoke with Ms. Vandor and she asked me to speak with you. I indicated to Ms. Vandor that I would also be arranging to make a numbered copy of the files.

We met with this afternoon at your office and you provided me three file folders with documents in them. The documents were loose in the files and not in chronological order. The documents in the files did not appear to be kept in any particular order, which will be reflected in the duplicate copy.

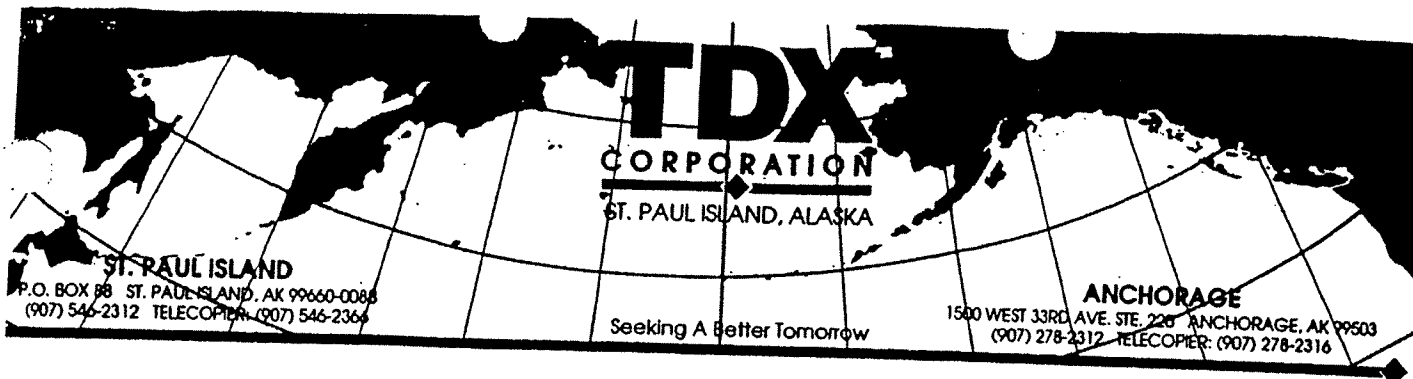
After my review, I contacted Downtown Legal Copies and arranged for them to pick up the three files from your office. I asked Downtown to make a duplicate numbered copy in the same order that the files were presented to me and to make several copies of the numbered copy. I asked Downtown to return the original files to your office and to provide you with a copy. I also explained these matters to you at that time.

Thank you for your assistance in this matter. If any counsel would like a copy of the files, please contact me.

Very truly yours,


George T. Freeman

Cc: Counsel



October 20, 2000

Mr. Ken Browning
General Services Administration / State of Alaska
2400 Viking Drive
Anchorage, Alaska 99501

Dear Mr. Browning,

TDX and its subsidiary Bering Sea Eccotech (BSE), are very interested in acquiring the Competent to use in BSE's Business Development Plan under the SBA 8(a) Program. Bering Sea Eccotech agrees to the proposed fees of \$200,000 to the State of Alaska and \$50,000 to Screeners Inc. Bering Sea Eccotech intends to move the vessel from its current berthing in Pearl Harbor to a local dry dock within two weeks of acquiring the vessel. Further more, BSE is fully aware of the potential abatement issues and has the financial resources and the expertise to carry out an abatement plan. However BSE needs to fully evaluate the entire problem and until a complete inspection of the vessel is done, a more thorough time line of abatement will be turned in to GSA, the State of Alaska, SBA and the EPA.

The time line will look something like this. The first month will be identifying all the problems and the second month will be putting an abatement plan together following the guidelines set forth by the EPA. The third through the fifth month will be implementing the abatement plan and the sixth month will be a final inspection and finishing any missed problems that were identified.

Sincerely,

TANADGUSIX CORPORATION

Ron Philemonoff
CEO

000150

Exhibit 19
Page 1 of 1

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on July 29, 2004, I filed the original and three copies of Motion to Reopen the Record for Supplemental Briefing Regarding Transfer Documents or, in the Alternative, to Remand for Fact Finding, Declaration of Thomas E. Bush Regarding Document Withheld by James Jobkar and Declaration of Thomas P. Schlosser Regarding Document Withheld by James Jobkar, with the Ninth Circuit Court of Appeals via Federal Express next day air to:

Clerk of the Court

Cathy A. Catterson
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
95 Seventh Street
San Francisco, CA 94119-3939

I further certify that on July 29, 2004, I served one copy of Motion to Reopen the Record for Supplemental Briefing Regarding Transfer Documents or, in the Alternative, to Remand for Fact Finding, Declaration of Thomas E. Bush Regarding Document Withheld by James Jobkar and Declaration of Thomas P. Schlosser Regarding Document Withheld by James Jobkar on counsel in the manner indicated below to the following addresses:

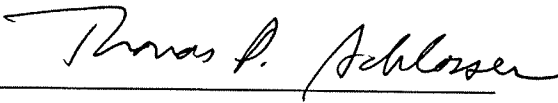
Marjorie L. Vandor, Assistant Attorney General
Alaska Department of Law
Attorney General, State of Alaska
Dimond Courthouse
P. O. Box 110300
Juneau, AK 99811-0300

****Via Electronic Mail and First-Class Mail****

Thomas M. Bondy, Attorney
Department of Justice, Civil Division
601 D Street NW, Rm. 9548
Washington, DC 20004

****Via Electronic Mail and First-Class Mail****

I declare the above to be true and correct under penalty of perjury. Executed
July 29, 2004, at Seattle, Washington.



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nmc:7/29/04