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STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

INDIAN CREEK DEVELOPMENT COMPANY,)
an Illinois Partnership, Individually as)
beneficiary under trust 3291 of the Chicago)
Title and Trust Company dated December 15,)
1981 and the Chicago Title and Trust Company,)
as trustee under trust 3291, dated December)
15, 1981)

Complainant,)

vs.)

The BURLINGTON NORTHERN SANTA FE)
RAILWAY COMPANY, a Delaware Corporation)

Respondents.)

PCB- 07-44
Citizen's Enforcement
§21(e), §12(a), §12(d)

NOTICE OF FILING AND PROOF OF SERVICE

TO: See Attached Service List

PLEASE TAKE NOTICE that on February 27, 2007, the attached document, Complainant's **Objection to BNSF's Motion for Leave to File an Additional Brief**, was filed with the Clerk of the Pollution Control Board and is hereby served upon the person(s) referenced above by placing a copy of the same in the U.S. mail at 222 N. LaSalle Street, Chicago, Illinois on or before 4:00 p.m. on the 6th day of February, 2007, with proper postage affixed.

**Indian Creek Development Company and
Chicago Land Trust Company t/u/t 3291,
dated December 15, 1981**

By *Glenn C. Sechen*
One of Its Attorneys

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Objection to BNSF's Add'l Brief.doc

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OBJECTION TO BNSF's MOTION FOR LEAVE TO FILE AN ADDITIONAL BRIEF

NOW COME the complainants, Indian Creek Development Company, individually and as the beneficial owner under the Chicago Title and Trust Company trust number 3291 dated December 15, 1981, and the Chicago Title and Trust Company, trustee under trust number 3291 dated December 15, 1981 (collectively, "Indian Creek") and file this Objection to the Burlington Northern Santa Fe Railway Company's ("BNSF") Motion for Leave to File an Additional Brief, and in support thereof Indian Creek states as follows:

INTRODUCTION

The BNSF has filed, "Respondent's Motion for Leave to File Instantly its Reply Brief in Support of its Motion to Dismiss" pursuant to 35 Ill. Admin. Code 101.500(e) which states in material part:

The moving person will not have the right to reply, except as permitted by the Board or hearing officer in order to prevent material prejudice.

In a nutshell, the only thing that results in material prejudice to the BNSF is the truth. Significantly, what the BNSF has to say rebuts nothing and changes nothing. Rather it shows what is really going on. Fourteen years after the initial release that subsequently contaminated Indian Creek's property and despite the ongoing flow of contaminants onto and under Indian Creek's property as alleged in the Complaint, the BNSF continues its tap dance.

ARGUMENT

The only thing that the BNSF seeks to accomplish is to delay and perhaps avoid its responsibility to remediate the Indian Creek Property. From its motion and attached reply brief, it is apparent that the BNSF does not, and indeed cannot, deny that the contamination at issue is a result of release of diesel fuel on its property fourteen (14) years ago. Nonetheless the BNSF apparently will not remediate its own property, the same property which the Complaint alleges to be the source of the contamination flowing on the Indian Creek Property. Significantly the Consent Order expressly allows the BNSF to not remediate the BNSF Property. Indian Creek has noted in its response memorandum:

One need only carry the BNSF's position to its logical absurdity to see the flaw in its position. For example, should the Agency mistakenly approve (which it has not) and the BNSF actually perform remediation on the BNSF Property to a level that is significantly less clean, than the Indian Creek Property, Indian Creek would have no remedy under the Act before the Board to protect itself from the continued flow of contamination onto its property. If BNSF never remediates its Property as allowed under Paragraph 3(d) of the Consent Order, BNSF's view is that Indian Creek still has no Remedy before the Board. Either way, BNSF's view would preclude a Remedy under the Act before the Board, the agency primarily vested with such authority.

Perhaps the BNSF is waiting to see if the passage of time alone will flush the contamination from the BNSF Property, causing it to flow onto the Indian Creek Property. Is this what the Act allows?

Certainly the Consent Order does not allow such a result. The Consent Order expressly states that neither the entry of the consent decree nor the stipulated facts therein can be used for any purpose except to enforce the Consent Order. The Order thus contemplates additional actions and places the BNSF's position at odds with the Consent Order itself. The BNSF doesn't address this issue, because it can't.¹

In its proposed additional brief, the BNSF attempts to impress the Board with its claimed diligence by attaching a subsurface investigation report, proposed remediation plan and a draft pilot test study work plan. All, however, relate to the Indian Creek Property and not the BNSF Property which is the upgradient source of the contamination. All this **is** in a supposed attempt to rebut Indian Creek's claims. However, what Indian Creek said in its response brief is:

BNSF is silent on what remediation measures have been submitted to and approved by the Agency regarding ANYTHING on the Indian Creek or the BNSF Property since the Consent Order was entered because fourteen years later, NOTHING of the sort has been approved by the Agency.

Significantly, BNSF's proposed reply brief makes it clear that nothing of the sort has been approved by the Agency. Significantly, BNSF's proposed reply brief makes it clear that Indian Creek's statement here continues to be true – nothing of the sort has been approved by the Agency.

¹ The BNSF claims that Indian Creeks' real agenda is to extort money from the BNSF by mischaracterizing the BNSF's prior Kane County Action. While that is completely inaccurate, the Board can review that complaint as it is attached to Indian Creek's last response.

It is also noteworthy that in its proposed reply, the BNSF again discusses the same cases as in its opening brief, and which Indian Creek refuted in its response. Of course, there is the supposed meeting of February 20th that the BNSF had with IEPA "to discuss the remediation plans for complainant's property (not the BNSF Property which is the source) developed by BNSF's consultant". It would have been nice to advise Indian Creek and its counsel that such a meeting was planned so counsel could attend. Instead, no notice of that meeting was received. Notice would have made it difficult to have the meeting in the time available between the February 16th filing of Indian Creek's response and the filing of the instant motion by the BNSF. Here we see just another failed attempt to show alleged diligence as though the Consent Order expressly anticipates and allows the complaint which Indian Creek filed.

WHEREFORE, Complainants, Indian Creek, pray that the Board deny the BNSF's motion for leave to file.

Respectfully Submitted,

Indian Creek Development Company and
Chicago Land Trust Company t/u/t 3291, dated
December 15, 1981

By: *Glenn C. Sechen*

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