

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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MAR 04 2014

PCB No.2014-081

STATE OF ILLINOIS  
Pollution Control Board



ORIGINAL

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

Complainant, )  
)  
)

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, )

Respondent. )  
)  
)

**NOTICE OF FILING**

TO: See attached service list

PLEASE TAKE NOTICE that on **March 4, 2014**, the undersigned filed with the Clerk of the Pollution Control Board, 100 West Randolph Street, James T. Thompson Center, Suite 11-500, Chicago, Illinois, BNSF'S RESPONSE TO INDIAN CREEK'S MOTION FOR LEAVE TO FILE A REPLY, a copy of which is attached and hereby served on you.

Respectfully Submitted,

By:

One of Their Attorneys

Pamela Nehring  
Sean M. Sullivan  
Jennifer E. Schuch  
Daley Mohan Groble, P.C.  
55 West Monroe Street  
Suite 1600  
Chicago, Illinois 60603  
(312) 422-9999  
Firm No. 36564

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**BNSF'S RESPONSE TO PLAINTIFF'S MOTION FOR LEAVE TO FILE A REPLY**

Defendant, BNSF Railway Company f/k/a The Burlington Northern and Santa Fe Railway Company ("BNSF"), by and through its attorneys, Daley Mohan Groble P.C., moves Indian Creek's Motion for Leave to File a Reply be denied:

1. On December 10, 2013 BNSF filed its Complaint for Allocation of Proportional Responsibility. BNSF accurately alleged that Indian Creek should be held responsible for its violations of various provisions of the Illinois Environmental Protection Act ("the Act"), and should be required to reimburse BNSF for its efforts to clean up contaminants that cannot be attributed to the January 20, 1993 collision.

2. Indian Creek filed a motion to dismiss BNSF complaint pursuant to Section 31(d) of the Act, 415 ILCS 5/31(d), arguing that the Board "lacks the authority to award BNSF contribution or allocate Respondent's proportionate share of liability. (Motion to Dismiss at ¶ 23).

3. Both parties have fully briefed the issues raised in Indian Creek's motion. Indian Creek's

proposed reply offers no additional support or information that would aid this Board in making its determination.


4. Indian Creek has not, and cannot, cite to any provision of the Act which requires BNSF to state to the specific procedural mechanism it seeks to enforce. Under §31(d)(1), the Board has the right to hear any cause of action based on a violation of the Act. 415 ILCS 5/31(d)(1). BNSF has accurately plead that Indian Creek violated the Act in a number of ways in both its Complaint and its Response to Indian Creek's Motion. BNSF supported those allegations with the facts of this case, and, as such, has satisfied the pleading requirements under the Act.

5. The regulations alleged both in BNSF's Complaint and Response clearly establish under the current fact scenario, where the Respondent initiated a similar Board action, allocation and/or contribution can and should be awarded. Further, Indian Creek's reliance on §22.2d(f) is misplaced. That provision is not the sole regulation which provides for contribution. *See* 35 Ill. Adm. Code Part 471, *People v. Fiorini*, 143 Ill. 2d 318, 337-338 (1991), *See also*, BNSF's Response at footnote 1.

6. The only avenue BNSF has to recover for costs unjustifiably paid as a result of Indian Creek's violation is through a separate allocation suit before this Board. BNSF cannot seek contribution in Indian Creek's pending Board action, nor can we seek to impose proportionate responsibility on Indian Creek in that case. As a result, BNSF's complaint should stand and Plaintiff's motion for leave to file a reply be denied.

WHEREFORE, BNSF Railway Company moves Indian Creek's Motion for Leave to File a Reply be denied, and for any further relief this Board deems necessary and appropriate.

BNSF RAILWAY COMPANY

By:   
One of Its Attorneys


Pamela Nehring  
Sean M. Sullivan  
Jennifer E. Schuch  
Daley Mohan Groble, P.C.  
55 West Monroe Street  
Suite 1600  
Chicago, IL 60603  
(312) 422-9999

**CERTIFICATE OF SERVICE**

I, Jennifer E. Schuch, an attorney, hereby certify that on the 4th day of March 2014, I caused the foregoing BNSF RAILWAY COMPANY'S RESPONSE TO INDIAN CREEK'S MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF IT'S MOTION TO DISMISS be served upon the following attorneys of record by depositing the same in the U.S. Post Office box located at 55 West Monroe, Chicago, Illinois, before the hour of 5:00 p.m., addressed as follows:

Stuart A. Petersen  
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601 N. Farnsworth Avenue  
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William J. Anaya  
Matthew E. Cohn  
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Jennifer E. Schuch