

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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MAY 06 2014

STATE OF ILLINOIS
Pollution Control Board

BNSF RAILWAY COMPANY, f/k/a The)
Burlington Northern and Santa Fe Railway)
Company,)

Complainant,)

v.)

INDIAN CREEK DEVELOPMENT COMPANY,)
an Illinois Partnership, individually and as)
beneficiary under trust 3291 of the Chicago Title and)
Trust Company dated December 15, 1981 and the)
Chicago Title & Trust Company, as trustee under)
trust 3291, dated December 15, 1981, and JB)
INDUSTRIES, INC.,)

Respondents.)

PCB 2014-081



ORIGINAL

NOTICE OF MOTION

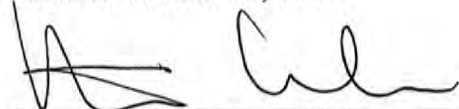
To: Pamela Nehring
Sean Sullivan
Daley Mohan Groble, P.C.
55 West Monroe Street
Suite 1600
Chicago, IL 60606

PLEASE TAKE NOTICE that on May 6, 2014, we caused to be filed with the Clerk of the Illinois Pollution Control Board located at the James R. Thompson Center, 100 Randolph, Suite 11-500, Chicago, Illinois, **RESPONDENTS' MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF RESPONDENTS' MOTION FOR RECONSIDERATION**, a copy of which is attached hereto and is hereby served upon you.

William J. Anaya (ARDC No. 6180020)
Matthew E. Cohn (ARDC No. 6273807)
Arnstein & Lehr LLP
120 South Riverside Plaza
Suite 1200
Chicago, Illinois 60606
(312) 876-7100
wjanaya@arnstein.com
mecohn@arnstein.com

Respectfully submitted,

Indian Creek Development Company, JB
Industries, Inc., and Chicago Title and Trust
Company, as Land Trustee under Trust No.
3291 dated December 15, 1981

By: 
One of Its Attorneys

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

BNSF RAILWAY COMPANY, f/k/a The)
Burlington Northern and Santa Fe Railway)
Company,)
)
Complainant,)
)
v.)
)
INDIAN CREEK DEVELOPMENT)
COMPANY, an Illinois Partnership, individually)
and as beneficiary under trust 3291 of the Chicago)
Title and Trust Company dated December 15, 1981)
and the Chicago Title & Trust Company, as trustee)
under trust 3291, dated December 15, 1981, and)
JB INDUSTRIES, INC.,)
)
Respondents.)
)

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**RESPONDENTS' MOTION FOR LEAVE TO FILE A REPLY
IN SUPPORT OF RESPONENTS' MOTION FOR RECONSIDERATION**

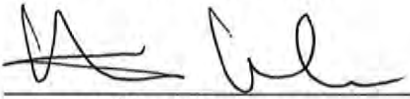
Respondents Indian Creek Development Company, JB Industries, Inc., and Chicago Title and Trust Company, as Land Trustee under Trust No. 3291, dated December 15, 1981 (collectively, "Respondents"), pursuant to 35 Ill. Adm. Code 101.500(e), hereby move the Illinois Pollution Control Board (the "Board") for leave to file a reply to Complainant BNSF Railway Company's Response to Respondents' Motion for Reconsideration. A copy of Respondents' Reply is attached hereto as Exhibit A.

Should the Board grant Respondents' Motion for Leave, Respondents respectfully request that the attached Reply (Exhibit A) be deemed entered and filed with the Board.

Respectfully submitted,

Indian Creek Development Company, JB
Industries, Inc., and Chicago Title and Trust
Company, as Land Trustee under Trust No.
3291 dated December 15, 1981

Dated: May 6, 2014

By: 

One of Its Attorneys

William J. Anaya (ARDC No. 6180020)
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EXHIBIT A

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

BNSF RAILWAY COMPANY, f/k/a The)
Burlington Northern and Santa Fe Railway)
Company,)

Complainant,)

v.)

INDIAN CREEK DEVELOPMENT COMPANY,)
an Illinois Partnership, individually and as)
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Chicago Title & Trust Company, as trustee under)
trust 3291, dated December 15, 1981, and JB)
INDUSTRIES, INC.,)

Respondents.)

PCB 2014-081

**RESPONDENTS' REPLY TO IN SUPPORT OF
RESPONDENTS' MOTION FOR RECONSIDERATION**

Respondents Indian Creek Development Company, JB Industries, Inc., and Chicago Title and Trust Company, as Land Trustee under Trust No. 3291, dated December 15, 1981 (collectively, "Respondents") reply to Complainant BNSF Railway Company's ("BNSF") Response to Respondents' Motion for Reconsideration.

BNSF's Complaint for Allocation of Proportionate Share Responsibility is premised on BNSF's allegations that Respondents contaminated their own property in violation of Sections 12(a), 12(d), and 21(e) of the Illinois Environmental Protection Act (the "Act"). In its Response to Respondents' Motion for Reconsideration, BNSF asserts, "Under § 31(d)(1) of the Act, any person may file with the Board a complaint against any person allegedly violating the Act." (Response at 2). This broad, sweeping statement is not the law. A party bringing an action against another under the Act must have standing, and BNSF lacks standing.

Other than responding to its own contamination, BNSF has no interest in Respondents or Respondents' property. BNSF's involvement with Respondents and their property only arose out of the State of Illinois' demand that BNSF clean up its contamination caused by its 1993 train accident. BNSF's allegations that Respondents violated the Act are baseless, but even if they had merit, BNSF would lack standing.

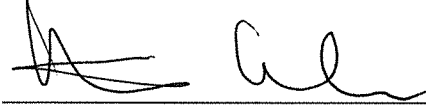
"The doctrine of standing is designed to preclude persons who have no interest in a controversy from bringing suit. The doctrine assures that issues are raised only by those parties with a real interest in the outcome of a controversy." Glissen v. City of Marion, 188 Ill.2d 211, 221 (1999), *citing* People ex rel. Hartigan v. E & E Hauling, Inc. 153 Ill.2d 473, 482 (1992). BNSF's only interest in the alleged statutory violations by Respondents is to establish an underlying statutory basis for BNSF to pursue contribution from Respondents. The fact that the State of Illinois is compelling BNSF to respond to contamination caused by its 1993 train accident does not give BNSF the right to sue Respondents.

Had the 1993 train accident not occurred, it would be without question that BNSF lacks standing to sue Respondents for their alleged violations of the Act that only affect their own property. Similarly, Respondents do not have standing to bring an action against BNSF for any of BNSF's environmental violations that do not affect them, such as violations that affect only BNSF's Eola Yard located a few thousand feet east of the accident site. BNSF's polluting event as a result of its 1993 train accident, which contaminated Respondents' property, does not give to BNSF the standing necessary to sue Respondents that it never had before the train accident.

WHEREFORE, for the reasons stated above and for the reasons stated in Respondents' Motion for Reconsideration, BNSF's Complaint for Allocation of Proportionate Share Responsibility should be dismissed.

Respectfully submitted,

Indian Creek Development Company, JB
Industries, Inc., and Chicago Title and Trust
Company, as Land Trustee under Trust No.
3291 dated December 15, 1981

By: 
One of Its Attorneys

Dated: May 6, 2014

William J. Anaya (ARDC No. 6180020)
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CERTIFICATE OF SERVICE

Matthew E. Cohn, an attorney, certifies that a true and correct copy of the foregoing **RESPONDENTS' MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF RESPONDENTS' MOTION FOR RECONSIDERATION** was served upon the following counsel of record:

Pamela Nehring
Sean Sullivan
Daley Mohan Groble, P.C.
55 West Monroe Street
Suite 1600
Chicago, IL 60606

by depositing a copy thereof, enclosed in an envelope, in the United States Mail at 120 South Riverside Plaza, Chicago, Illinois, proper postage prepaid, at or about the hour of 5:00 p.m. on May 6, 2014.


Matthew E. Cohn