

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: Robert M. Barratta Jr.
Freeborn & Peters, LLP
311 S. Wacker Drive, Suite 3000
Chicago, Illinois 60606

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Ctr., Ste. 11-500
100 W. Randolph Street
Chicago, Illinois 60601

PLEASE TAKE NOTICE that on September 8, 2009, the attached document, Complainant's **Response to the BNSF's Opposition**, 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 the U.S. Post Office, Cedar Lake, Indiana 46303 on or before 4:00 p.m. on the 8th day of September, 2009 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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RESPONSE TO THE BNSF's OPPOSITION

NOW COME the complainants, Indian Creek Development Company, individually and as the beneficiary 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 responds to the Opposition to Complainant's Motion to Strike Burlington Northern and Santa Fe's Affirmative Defense. In support thereof, Indian Creek states as follows:

1. This matter involves a release of diesel fuel on January 20, 1993 on property owned and operated by the BNSF ("BNSF Property").
2. The Complaint alleges that property owned by Indian Creek ("Indian Creek Property") continues to receive soil and groundwater contamination flowing from the BNSF Property all these years after the release.

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3. In 1996, Prosecutors filed a civil enforcement action in Circuit Court and obtained a consent decree against the BNSF which expressly precludes enforcement by third parties such as Indian Creek.

4. Thereafter, contamination was discovered on the Indian Creek Property some or all of which remains to this day.

5. Indian Creek timely filed a case in Circuit Court in Kane County seeking, among other things, damages.

6. That case was dismissed with leave to reinstate and that case was refiled before the Board as the instant enforcement action.

7. The right to reinstate the Kane County case was extended several times, some or all by way of agreed order.

8. On July 20, 2009 the BNSF filed its Amended Answer including one affirmative defense, the statute of limitations.

9. Paragraphs 6 through 8 of its affirmative defense state:

6. The Kane County lawsuit referenced by Indian Creek was dismissed with leave to reinstate, which order has been extended a number of times.

7. Currently, the Kane County lawsuit may be reinstated by Indian Creek prior to November 23,2009.

8. Indian Creek has not reinstated the Kane County lawsuit.

10. Indian Creek moved to strike paragraphs 6 through 8 inclusive

11. On pages 3 to 4 of its motion to strike of its motion to strike, Indian Creek states that:

The BNSF's Amended Answer pleads no nexus between the allegations paragraphs 6 through 8 and the statute of limitations. It is completely vague and wholly unclear what impact on the statute of limitations defense the facts alleged in paragraphs 6 through 8 is claimed to have. It is complete guesswork. These paragraphs do not set forth anything, except perhaps evidentiary facts. Perhaps these paragraphs are intended as some sort of premature response to Indian Creeks expected answer to the statute of limitations defense. Indian Creek will answer, among other things, that this case is a refiling of Kane County case number 04 L 607 filed on or about December 7, 2004. At most paragraphs 6 through 8 are evidentiary facts and not ultimate facts as are required to be pled. Either way, they are vague, unclear, improper surplusage and should be stricken. *Citation omitted, emphasis added.*

12. In its opposition the BNSF simply argues without support that paragraphs 6 through 8 plead ultimate facts which should be liberally construed and which are intended to inform Indian Creek its Limitations defense. BNSF Opposition at 5 and 6.

13. The BNSF completely ignores both the lack of relevancy and the lack of materiality of the allegations in question on the statute of limitations defense.

14. The BNSF does not explain the impact on its defense because there is none.

15. A proper affirmative defense would merely raise the statute of limitations defense.

16. Indian Creek could then plead that, among other things, the limitations period has not run and was tolled by the filing of the Kane County case.

17. Thereafter, the BNSF could plead that the prior filed case failed to toll the statute of limitations because of some unstated and unpled reasons possibly related to the dismissal with leave to reinstate.

18. Perhaps the paragraphs 6 through 8 are some sort of attempt by the BNSF to speculate concerning what Indian Creek will do prior to November 23, 2009 by which time Indian Creek may reinstate the Kane County case.

19. Significantly, the BNSF does not even attempt to explain what it means or attempts to plead regarding the right to reinstate the Kane County case and how paragraphs 6 through 8 relate to its limitations defense but, importantly, neither the Board nor Indian Creek are required to guess.

20. Should the BNSF feel that whatever happens prior to November 23, 2009 regarding reinstating the Kane County case gives it an argument that this case is time barred, it should move to amend its affirmative defense and/or file a motion to dismiss at that time.

21. Without the filing of the instant motion to strike, the BNSF would not be forced to litigate or even properly plead the Kane County case's impact on the statute of limitations until the hearing or, perhaps, post hearing motions.

22. Board's procedural rules provide that "any facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not have been known before hearing." 35 Ill. Adm. Code 103.204(d).

23. Significantly, whatever the BNSF later claims that the allegations of paragraphs 6 through 8 mean, that meaning is subject to change until and unless the BNSF is forced to clearly plead the meaning of those allegations and make clear their claimed impact on the statute of limitations. These allegations are, accordingly, a wild

card and could later be claimed to mean something wholly unexpected depending on the need at a later time.

24. Section 2-613(d) of the Code of Civil Procedure specifically provides that the facts constituting any affirmative defense must be plainly set forth in the defendants' answer. 735 ILCS 5/2-613(d)

25. Even if the BNSF is correct [and it is not] that paragraphs 6 through 8 plead ultimate facts, these paragraphs are still vague, unclear, improper surplusage and should be stricken. Board of Education of Kankakee School District v. Kankakee Federation of Teachers, 46 Ill.2d 439, 264 N.E.2d 18 (1970).

WHEREFORE, Complainants, pray that the Board grant Indian Creek's motion to strike and force the BNSF to properly plead its affirmative defense.

Respectfully Submitted,

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

By: *Glenn C. Sechen*

Glenn C. Sechen, Of Counsel
Schain, Burney, Ross, & Citron, Ltd.
13909 Laque Drive
Cedar Lake, Indiana
(312) 550-9220
sechlaw@yahoo.com