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May 12, 2008
01050073

Mr. Robert W. Warren
Section Manager, NW regional Office
Toxics Cleanup Program
Department of Ecology
3190 – 160th Ave SE
Bellevue, WA 98008-5452

RECEIVED

MAY 15 2008

**HILLIS, CLARK, MARTIN
& PETERSON, PS**

Re: BNSF Former Fueling and Maintenance Facility, Skykomish, WA
Access Agreements Required for Skykomish Hotel by
Consent Decree No 07-2-33672-9

Dear Mr. Warren:

Thank you for your letter dated May 6, 2008, regarding the above matter. I received it today. It is apparent from your letter that you have not been fully-informed of BNSF's efforts to obtain access from the Skykomish Hotel and resolve the owners' alleged claims. This letter provides details in that regard so that Ecology is reassured that BNSF is in compliance with the Consent Decree, and BNSF has and continues to diligently attempt to obtain access to complete cleanup on properties not owned by BNSF.

BNSF first met with Mr. Benz, his business partner, and his legal counsel on December 6, 2005, in Seattle in response to his request for information about the cleanup in Skykomish. Since Ecology had not yet issued a cleanup action plan, the conversation was necessarily general in nature, however, BNSF did indicate its willingness to continue to meet again with Mr. Benz and discuss his concerns as BNSF was doing with other property owners. We also encouraged Mr. Benz to provide BNSF with a specific written proposal to the extent he believed he had a valid claim against BNSF for damages related to BNSF's activities in Skykomish. To date, we have not received anything from Mr. Benz in this regard.

In the Spring of 2007, BNSF's legal counsel and your legal counsel attempted to engage Mr. Benz, though his legal counsel, in a conversation about consent to a conditional point of compliance (CPOC) for groundwater. Ecology indicated that it needed the letter in support for its draft CAP, which was scheduled to be released for public review and comment in June 2007. Mr. Benz indicated that he would not discuss the CPOC consent letter except as part of a larger conversation with BNSF regarding access to his property in 2008 as part of the cleanup work described in the draft CAP.

On June 21, 2007, BNSF provided Mr. Benz, through his legal counsel, with a proposed access agreement for 2008. The content of the agreement was similar to the type of agreements BNSF

used for similar properties in Skykomish in 2006, including a provision that BNSF would reimburse Mr. Benz for costs incurred in access agreement negotiations. During the negotiations, Mr. Benz granted (July 2007) and then revoked (August 2007) permission for BNSF's contractors to enter his property to collect soil samples or conduct the historical and structural evaluation required for the 2008 remedial design. See attached correspondence dated August 6, 2007.

Also during the summer of 2007, Mr. Benz suggested that BNSF acquire his property rather than enter into the access agreement we had proposed. Mr. Benz initially suggested that BNSF use the same appraiser that BNSF had been using in Skykomish for several years to resolve the concerns of other property owners. Subsequently, Mr. Benz placed unacceptable conditions on that appraiser's ability to continue working for BNSF. BNSF rejected the conditions and proceeded with the appraisal and obtained an opinion on fair market value without Mr. Benz cooperation.

On October 5, 2007, BNSF made a firm offer to acquire the Hotel property based on the appraised value and to pay additional sums to resolve Mr. Benz alleged claims, including reimbursing his legal fees. BNSF also requested, as a sign of good faith, that Mr. Benz permit BNSF's contractors to enter the property to conduct historical and structural evaluations for purposes of the 2008 remedial design while we continued to negotiate. Mr. Benz rejected this offer on October 12, 2007 and refused access, again. He also indicated that he would not talk to BNSF further or respond to any offers or inquiries unless BNSF paid unspecified amounts of money for his old legal fees. As a result, work on the Hotel property was deferred from 2008 to 2009, Ecology revised the draft CAP accordingly, and BNSF has focused its efforts on obtaining access from other property owners for 2008.

After successfully obtaining access from other property owners for 2008, BNSF reinitiated contact with the Skykomish Hotel on April 17, 2008, with regard to access to the Skykomish Hotel property for 2009. In an effort to be responsive to Mr. Benz October 12, 2007 rejection of BNSF October 5 offer, BNSF has offered to enter into an "interim cost reimbursement agreement" similar to the agreements BNSF has entered into with the Town of Skykomish and the Skykomish School District No. 404. This type of agreement includes a provision with a set-off against future claims equal to the amount of money BNSF pays. To date, BNSF has yet to hear any response from Mr. Benz or his legal counsel.

To summarize, contrary to Mr. Benz assertions, BNSF has not offered to pay his or anyone's legal fees in Skykomish *except* as part of a full or partial settlement of claims or as part of a signed access agreement. BNSF has reimbursed many property owners in Skykomish for their costs as part of settlements and access agreements and made that same offer to Mr. Benz in June 2007, October 2007 and again on April 14 of this year. To date Br. Benz has either rejected the offers or refused to respond. BNSF is frankly mystified and frustrated that it can reach good faith, amicable and reasonable accommodations with dozens of landowners in Skykomish but make no progress whatsoever with Mr. Benz. BNSF simply will not write Mr. Benz a large check just to get him to speak to us. BNSF has not done that in the past in Skykomish and we do not intend to do so now. We have and will continue to pay reasonable costs incurred in negotiating with BNSF once an agreement is signed, and in certain limited cases we will enter

into an interim cost reimbursement agreement, which is what we proposed to Mr. Benz on April 14.

We would appreciate you and your legal counsel contacting Mr. Benz and his counsel and urge Mr. Benz to negotiate with BNSF in good faith for access for 2009, as BNSF and other property owners had done. If you have further questions, please contact me or Bruce Sheppard directly, or have your legal counsel contact Craig Trueblood, BNSF's legal counsel.

Sincerely



David C. Clark, P.E.
Director Environmental Remediation

cc: Mark Stehly, BNSF
Bruce Sheppard, BNSF
Charles Shewmake, BNSF – Law Dept
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August 6, 2007

Craig S. Trueblood
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206.370.8368

Mr. Howard Jensen
Hillis Clark Martin & Peterson, PS
1221 Second Avenue, Suite 500
Seattle, WA 98101-2925

VIA HAND DELIVERY

Re: Skykomish Hotel – Remedial Design Investigation

Dear Howard,

As you know, I am counsel to BNSF Railway Company. Your client, Mr. Benz, has informed BNSF's contractors that all issues related to the cleanup in Skykomish should be directed to your attention. Accordingly, enclosed is a copy of the work plan for remedial design activities in Skykomish this fall. One of the borings described in the work plan (1A-B-23) would be located on your client's property (others will be in the public rights of way near your client's property). Section 2.4 of the work plan generally describes the work, Section 3.0 describes the work in some detail, and Figures 3-1 and 3-5 indicate the proposed location of all the borings, including 1A-B-23. The contractor notes that there is a trailer located on your client's property where boring 1A-B-23 would be installed and BNSF would, of course, arrange to have this trailer moved temporarily to accommodate the work and would return it to its current location.

The drilling contractor is scheduled to be in Skykomish the week of August 20, so we would appreciate your response to this request for access by August 15.

Very truly yours,

KIRKPATRICK & LOCKHART PRESTON GATES ELLIS LLP



By
Craig S. Trueblood

cc (w/o encl.): Bruce Sheppard, BNSF
Kristie Carevich, Office of the Attorney General

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August 6, 2007

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206.370.8368

Mr. Howard Jensen
Hillis Clark Martin & Peterson, PS
1221 Second Avenue, Suite 500
Seattle, WA 98101-2925

VIA E-MAIL

Re: Skykomish Hotel – Structural Inspection and Evaluation

Dear Howard,

As you know, I am counsel to BNSF Railway Company. Your client, Mr. Benz, has informed BNSF's contractors that all issues related to the cleanup in Skykomish should be directed to your attention. BNSF's contractor prepared a scope of work for a structural inspection of your client's buildings for purposes of determining whether and how the buildings might be temporarily relocated to accommodate cleanup in 2008, as described in the Department of Ecology's Draft Cleanup Action Plan. I provided you with a copy of the scope of work with my e-mail to you of July 19. BNSF's contractors had been informed by your client that the inspection could take place on August 17, but more recently they were informed that this date was no longer acceptable to your client.

Please let me know as soon as possible when BNSF's contractor can complete this work. Your client need not be present but is welcome to observe the work. BNSF is tentatively scheduled to provide Ecology with a structural evaluation report by the end of September but this is, of course, dependent upon being allowed to complete the inspection in a timely manner.

Very truly yours,

KIRKPATRICK & LOCKHART PRESTON GATES ELLIS LLP

By


Craig S. Trueblood

cc: Bruce Sheppard, BNSF
Kristie Carevich, Office of the Attorney General