



**CONFIDENTIAL COMMUNICATION**

2008-05-21

Mr. Robert W. Warren  
Section Manager, NW Regional Office  
Toxics Cleanup Program  
Department of Ecology  
3190 - 160<sup>th</sup> Ave SE  
Bellevue, WA 98008-5452

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:

In response to BNSF Railway letter dated May 12, 2008 and your letter to BNSF of May 6, 2008, this will serve to clarify statements and numerous misrepresentations made by Mr. Clark. Mr. Clark's comments are in blue, my clarifications are in black.

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.

Mr. Clark either is misinformed or lacks good faith. As Hotel owners discussed in their meetings with WSDOE, state legislators and subsequently with you and Brad Petrovich, the timing of the few communications Hotel owners have received from BNSF all appear to be solely for purposes of appearing to make 'good faith' efforts to resolve issues.

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.

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The meeting was the direct result of a request made by Angie Thomson to Dieter Benz on behalf of Bruce Sheppard. Bruce Sheppard and Craig Trueblood arrived at this meeting along with Danny Thomason who, in response to my question as to his purpose at the meeting, responded that he was the 'Checkbook' and indeed had a checkbook in his possession. BNSF had in its possession and presented a settlement agreement which was immediately rejected as insufficient in light of the extensive nature of BNSF's damages to and BNSF's pollution of the Hotel property.

If the conversation was 'necessarily general in nature' what was the purpose of arriving with a settlement agreement already prepared and Mr. Checkbook being there? It has been standard practice for BNSF representatives to state 'its willingness' on many issues. However, their actions and attempted manipulations and misrepresentations speak volumes to the contrary.

BNSF knew on December 6, 2005 they would indeed be ordered to perform a cleanup of Hotel property. BNSF also knew on December 6, 2005 that Hotel owners as well as other property owners in the town polluted by BNSF would be seeking compensation for the damages caused by BNSF.

BNSF was advised by Hotel owners' legal counsel that, at such time as was necessary, in the absence of good faith on the part of BNSF to make Hotel owners whole as a result of damages and pollution caused by BNSF to the Hotel property, a lawsuit would be filed which would state Hotel owners' claims. BNSF was encouraged at that meeting to return to the drawing table, prepare a more substantive offer of settlement and return in good faith to Hotel owners to continue negotiations. This has yet to occur.

In Spring 2007, BNSF's legal counsel and your legal counsel attempted to engage Mr. Benz, through 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.

This is false. BNSF, through its legal counsel, informed Hotel owners and other property owners it was required to obtain the signatures of 100% of affected property owners on this conditional point of compliance letter in order to be allowed to perform a lesser level cleanup.

Hotel owners had comprehensive discussions with their legal counsel and WSDOE representatives at which point it was determined that it was not in Hotel owners' interests to sign that letter. Hotel owners had yet to be contacted by BNSF in good faith with regard to discussing either access to their property or purchasing the property as part of a settlement.



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Mr. Clark fails to state that the initial contact in Spring 2007 from BNSF's legal counsel was that BNSF was interested in purchasing the hotel. Hotel owners received communication through their legal counsel from BNSF legal counsel that BNSF was interested in purchasing the Hotel property.

However, as is standard in any real estate transaction, BNSF failed and refused to provide a substantive written offer and also did not otherwise state any offer price. Nonetheless, in reliance on BNSF's numerous commitments to pay the legal fees (without any stated exceptions) of property owners electing to engage in discussions with it, Hotel owners agreed, in good faith, to maintain discussions for several months until it was clear that BNSF had no good faith intention of purchasing the property.

This feined attempt appeared to be a ruse perpetrated by BNSF to persuade Hotel owners to sign BNSF's required conditional point of compliance and/or gain access to the Hotel property without negotiating a purchase, settlement or the required access agreement. WSDOE had already presented in its January 2007 town update meeting the plan for requiring the access agreement.

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.

There are no properties similar to the Skykomish Hotel in the Town of Skykomish. It was determined after discussions with legal counsel, and as Mr. Clark admits, that this proposed, 'boilerplate' if you will, access agreement did indeed appear to be meant for another property and lacked form and content sufficient to respond. More importantly, in as much as this document arrived so close to the commencement of the comment period for the Draft Cleanup Action Plan it was also added to the list of what Hotel owners believe to be continuing efforts by BNSF to dupe and deceive others.

Mr. Clark states that 'during these negotiations' ... To be clear: There have been no negotiations to date between BNSF and Hotel owners, only strategic, poorly timed communications from BNSF which appear to convey one thing but serve BNSF purposes exclusively, to the detriment of others.

This appears to have led them to a dead end which apparently has not served their purposes. Their apparent 'frustration' is entirely of their own making. They have failed and continue to fail to fulfill commitments to Hotel owners. (See further discussion below on recent communication from BNSF legal counsel.)

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Mr. Clark is correct that Hotel owners did agree to entry of required engineering personnel for purposes of determining the status of the Hotel for the 2008 cleanup. Yet Hotel owners were informed by WSDOE that BNSF informed them Hotel owners were denying access.

As it became clear with BNSF's continued additions to the list of personnel and time required 'on site,' Hotel owners determined that BNSF was once again attempting to gain access without having obtained an access or settlement agreement, while at the same time attempting to take advantage of Hotel owners' demonstrated good faith willingness to cooperate with cleanup efforts.

As a result of BNSF's misrepresenting Hotel owners' unwillingness to allow access of required engineering personnel, the cleanup of the Hotel property was plucked out of the middle of the 2008 cleanup and delayed until 2009. Are these actions on the part of BNSF those of a responsible party acting in good faith?

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.

This is false. The suggestion was to commence good faith negotiations for the required access agreement or to purchase the property. While BNSF has had numerous opportunities to purchase the Hotel property for a mere fraction of its current market value over the last 17 years, they did not.

BNSF initiated and had already conveyed in the spring of 2007, whether real or feigned, an interest in purchasing the Hotel property. While Hotel owners believe that was an attempt to get them to sign the conditional point of compliance letter, it nonetheless opened up the possibility of a sale transaction.

As BNSF was informed at their earlier expression of interest in purchasing the Hotel, Hotel owners were in the initial stages of moving out of their leased offices in Seattle. Hotel owners' commercial interests had transitioned to a virtual, paperless environment and no longer required a formal office in the Metropolitan area.

As a result of the continued dallying of BNSF on their continued feigned interest in purchasing the Hotel, Hotel owners incurred an additional seven months of lease and other office operating expenses, exceeding \$7,000 per month to entertain BNSF's still as yet unwritten intention to purchase the Hotel property.

Once it was concluded by Hotel owners that BNSF had no intention of purchasing the property, and further it appeared that BNSF was continuing to rotate discussions for the



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purpose of escalating Hotel owners' legal fees, the decision was made that no further discussions would be had through Hotel owners legal counsel until the legal bills were paid/reimbursed as promised by BNSF representatives (without exception). Keep in mind when Hotel owners made this decision, as of August 2007 (several months after hearing from BNSF's legal counsel that BNSF was interested in purchasing the property), no formal written offer was tendered nor even any price stated by BNSF with regard to a purchase of the property or access for the cleanup. Sound business decisions dictate severing expenses that are not achieving any goal.

With regard to using a common appraiser for the Hotel appraisal, after Mr. Benz' discussion with BNSF's selected appraiser, Hotel owners suggested through legal counsel that for this one property appraisal only, the Hotel property, BNSF's selected appraiser be used to represent both parties. The appraiser was still free to perform for BNSF exclusively as he would have determined was right for his appraisal firm to do. It is unclear how this could be considered 'unacceptable' unless something less than a forthright determination and testimony was being sought. As Mr. Clark states, it was BNSF who refused to allow this.

Mr. Clark further states that an appraisal was performed on the property without Hotel owners' knowledge. No appraiser had permission of Hotel owners for such an appraisal and we hope they did not trespass onto private property in performing this appraisal for BNSF. This will be discovered in court if necessary. Additionally, no interior inspection of the property was performed, nor any information obtained by any appraiser with regard to income and expenses of the property, both of which are required in accordance with standard appraisal practices to arrive at an accurate estimated market value for a commercial property. These actions are certainly out of compliance with USPAP and FIRREA appraisal regulations. See further discussion below regarding alleged 'firm offer' by BNSF to purchase Hotel.

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.

The 'firm offer' (meaning, finally a written offer) Mr. Clark is referring to, according to Mr. Clark's own admission, was in fact based on an incomplete and inaccurate appraisal and essentially offered \$400,000 for the real estate and all of the personal property located in the building.

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As anyone peering inside any of the windows can see, Hotel owners also own an extensive antique collection which includes many valuable and irreplaceable items and has been professionally appraised by a certified antique appraiser in excess of \$420,000.

Included in this 'firm offer', BNSF further offered to compensate for \$20,000 in Hotel expenses and \$50,000 for all other claims related to BNSF's pollution and damage to the Hotel property. BNSF had been previously informed on numerous occasions that Hotel owners had already incurred legal fees alone in excess of \$25,000 as a direct consequence of BNSF requests.

No recognition was given to other expenses resulting from BNSF's contamination of the property or other claims Hotel owners assert against BNSF. Hotel owners, in effect, were offered to sell their property and pay BNSF the sum of \$20,000 to do so. Anyone with reasonable intelligence and common sense can see through this scam.

This 'firm offer' also contained a provision that Hotel owners would sign the conditional point of compliance letter upon execution of the agreement, essentially precluding any negotiation on that issue.

This 'firm offer' came just two weeks prior to entry of the Consent Decree and final cleanup action plan and was added to the growing list of strategically timed communications from BNSF.

It was at this point, October 2007, that Hotel owners informed BNSF through its legal counsel that they were not in danger of becoming the next owners of the property, **and strongly recommended that BNSF immediately commence access agreement negotiations.**

Instead, BNSF waited until April 17, 2008, approximately 10 weeks prior to the onset of 2008 clean up activities which Hotel owners believe will negatively impact Hotel real estate and operations and eleven days prior to a scheduled meeting with representatives from WSDOE and state legislators at the request of Hotel owners.

Contained in this partial settlement offer was a provision for both parties not to file suit against the other for six months. This appears to be yet again a maneuver by BNSF to attempt to delay Hotel owners' filing of a lawsuit until after cleanup work for 2008 is completed.

This pollution cleanup site has been listed with WSDOE since 1991. BNSF has known for over 17 years that it would need to resolve the problem, and yet they waited until April 17, 2008, to make what they feel is a workable offer. Hotel owners have submitted a counter-offer to BNSF and are hoping finally to commence and complete real negotiations and settle this matter. That will require good faith on the part of BNSF which to date has not been demonstrated.



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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 setoff 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.

Hotel owners take exception to Mr. Clark's comment that BNSF 'successfully' obtained access agreements from property owners for the 2008 cleanup. The Hotel property was originally scheduled for cleanup in 2008. Their alleged success came only in deceiving WSDOE with regard to Hotel owners' willingness to allow required engineers access and thereby causing WSDOE to delay the Hotel property cleanup to 2009. Eliminating damaging information from consideration cannot be portrayed as success in the real world.

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 Mr. 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

To summarize: BNSF representatives stated in numerous open public meetings with WSDOE representatives, town citizens and business and property owners including Hotel owners, Town government representatives and others that it would pay the legal fees of 'any property owner electing to enter into discussions with it regarding cleanup and damage issues' (without exception).

These are not Mr. Benz' assertions as numerous WSDOE representatives and others know. That being said, Hotel owners are fair minded business people and have not sought nor are seeking anything which was not promised nor to which they are not entitled. However, they relied in good faith on commitments from BNSF to pay legal fees, entered into discussions with BNSF at the request of BNSF and its legal counsel,

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made numerous demands for payment of legal fees which went unpaid and communications went unanswered.

Hotel owners continued to incur fees at the continued bantering from BNSF until it became clear in August of 2007 that BNSF had no intention of making a real offer to purchase the property or commence good faith discussions for an access or settlement agreement.

Mr. Clark states: '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'. He is clearly out of touch with the true status of things in Skykomish. WSDOE representatives and legislators have informed us that Hotel owners are among many in Skykomish who are not in agreement with Mr. Clark's statement.

And: . . . 'write 'Mr. Benz a large check' just to get him to speak with BNSF? This sounds silly and childish especially in light of the many months Hotel owners, in good faith and in reliance on BNSF's commitment to pay legal fees, kept communications going with BNSF to no avail.

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.

Again, Mr. Clark must heed his own suggestion of acting in good faith and actually commence practicing it on behalf of BNSF. His further suggestion that Hotel owners incur additional legal fees again demonstrates his ignorance of the facts, or in the alternative, his continuing stance alongside BNSF's local site/project manager and local legal counsel continuing attempts to deceive.

Referring Hotel owners back to Bruce Sheppard and/or Craig Trueblood is not recommended if you are serious about obtaining resolution. I suggest WSDOE continue to work with BNSF at the highest levels in order to obtain a more forthright recognition of the serious issues now before it and BNSF as result of BNSF's continuing deceit, attempted manipulations and lack of good faith.

BNSF, as well as Hotel owners have a duty of candor to WSDOE in not leading them on a wild goose chase. Inaccurate, incomplete and misleading statements and the omission of relevant information or fact is seen by Hotel owners as an attempt to deceive.

Enough is enough.





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