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IN THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT
FOR THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

HELEN YOST,
WILD IDAHO RISING TIDE
Plaintiffs,

vs.

DAVID GROESCHL, DIRECTOR
IDAHO DEPARTMENT OF LANDS
CHRIS BROMLEY, HEARING OFFICER,
IDAHO BOARD OF LAND
COMMISSIONERS
Defendants

Case Number: _____

**NOTICE OF APPEAL OF
FINAL ORDER OF APPROVAL
OF ENCROACHMENT PERMIT
L-96-S-0096E TO APPLICANT
BNSF RAILWAY**

In accordance with Idaho Code § 58-1306(c) and IDAPA 20.30.04.030.09, Helen Yost on behalf of Wild Idaho Rising Tide, as WILD IDAHO RISING TIDE, Plaintiff, hereby files this notice of appeal of the preliminary and final orders of approval of the application for encroachment permit L-96-S-0096E by Burlington Northern Santa Fe Railway (BNSF) for its proposed Sandpoint Junction Connector Project, granted by David Groeschl, director of the Idaho Department of Lands (IDL), on June 21, 2018, with a five-year sunset period for construction.

As aggrieved parties who appeared at the public hearings on case PH-2018-PUB-20-001, held before hearing officer/coordinator Chris Bromley for the State Board of Land Commissioners of the State of Idaho, on May 23, 2018, in Ponderay and Sandpoint, Idaho, we hereby exercise the right to request review by the Idaho First Judicial District Court in Bonner County, where the encroachment is proposed, of the entire record, proceedings, findings of fact, conclusions of law, preliminary order, and final order of this application, case, and permit, by filing this notice of appeal and a bond in an amount not less than \$500 and determined by this District Court, within thirty (30) days from the date of this final order, and as stated in its concluding legal notification.

PLAINTIFFS & CONCERNS

The Wild Idaho Rising Tide (WIRT) collective confronts the root causes of climate change by asserting direct actions and promoting locally organized solutions, in solidarity with frontline communities of resistance and an international, volunteer, grassroots network of activists. During seven-plus years as an informal group, collective members have resided, worked, and recreated in, and contributed to the local and regional cultures and economies of Sandpoint, Bonner County, and other Idaho cities and counties and U.S. states.

We oppose BNSF Railway's Sandpoint Junction Connector Project activities and construction of 2.2 miles of doubled tracks, two temporary, work spans, and three permanent, parallel bridges adjacent to the existing rail route across Lake Pend Oreille, Sand Creek, Bridge Street, and downtown Sandpoint, Idaho, because this railroad infrastructure expansion and resulting, bi-directional,

train passage would significantly, cumulatively, and adversely impact many aspects of our lives and livelihoods. Approval of encroachment permit L-96-S-0096E would jeopardize regional, lake and aquifer water resources, air quality, wetlands, shorelines, native fish, wildlife, and threatened bull trout and their habitats, indigenous rights and cultures, human and environmental health and safety, emergency response capacities, earthquake and disaster resilience, historic sites, vehicle travel at rail crossings, boat navigation, tourism, recreation, businesses, residences, property and economic values, and other, public interest factors. This permit approval would also increase the ongoing and potential traffic, noise, pollution, and accident and derailment dangers of the fossil fuels and hazardous materials trains that we have actively denounced through numerous, WIRT and allied, north Idaho, citizen, group, and government, public comments, hearings, protests, and court cases over the last few decades.

ERRORS OF FINAL ORDER

In his brief, six-page order on behalf of the State Board of Land Commissioners, IDL acting director David Groeschl in Boise bases his decision on some of IDL-appointed hearing coordinator Chris Bromley's June 14, 2018, preliminary order, recommending permit approval, and on the entire public record for this permit, including approximately 1,100 written comments and dozens of oral testimonies at two May 23, 2018, public hearings, as posted on the IDL website at <https://www.idl.idaho.gov/lakes-rivers/lake-protection/index.html>.

Director Groeschl cites the Idaho Lake Protection Act and relevant rules, as well as the preliminary and final orders' findings of fact and conclusions of law,

as the basis for granting BNSF's encroachment permit. According to the exactly same verbiage of the Idaho legislative intent of the Lake Protection Act (title 58, chapter 13 of Idaho code) and the policy section 11.01 (Environmental Protection and Navigational or Economic Necessity) of Idaho Rules for the Regulation of Beds, Waters, and Airspace over Navigable Lakes (IDAPA 20, title 3, chapter 4), "public health, interest, safety, and welfare require that all encroachments upon, in, or above the beds or waters of navigable lakes of the state be regulated in order that the protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality be given due consideration and weighed against the navigational or economic necessity or justification for, or benefit to be derived from the proposed encroachment."

The final order's findings of fact, adopted from the factual and procedural background outlined in Mr. Bromley's preliminary order, overly quote and mimic the BNSF application to establish facts, under headings like The Bridges and Nearshore Edge Fill Below the Ordinary High Water Mark, and describe and defend IDL and other state and federal agency actions and statements to show purportedly compliant procedures, with sections entitled Notice of the Application and Hearings, Written Comments, and The Public Hearings. Director Groeschl declines to finalize 13 of the 45 conclusions of law of the preliminary order, striking and re-inserting the aforementioned language of the laws and rules he must uphold with his ruling, while omitting the requirements for "public health, interest, safety, and welfare" that navigable lake encroachments in the state must meet. Furthermore, the preliminary and final orders inadequately "weigh those

'lake values' against the benefit of the project" with only two of 42 pages of discussion in the final/preliminary order, in paragraphs 33 to 37, finding that "the preponderance of the evidence leads in favor of approving the application." Instead of independently comparing and analyzing the detriments and benefits of the proposed project for "lake values" and the "public trust doctrine" more accurately and expansively defined than in the preliminary and final IDL orders, IDL director Groeschl, via hearing officer Bromley, only briefly refers to comments by individuals and agencies stating concerns for protection of property, navigation, recreation, fish and wildlife habitat, aquatic life, water quality, and aesthetic beauty. The final order presents insufficient evidence that the responsible Idaho agency officials have adequately examined and considered these concerns.

The final and preliminary orders defer in their decisions to antiquated, United States, railroad land grant laws and 1000-plus BNSF, pro-second bridge, form letters, and thus sidestep stricter state regulations regarding lake encroachments. The 1864 U.S. Congressional "act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route" gives railroad companies unusual power to utilize their holdings. As provided by this 154-year-old, federal law, BNSF retains exclusive possession and "complete dominion" over its 400-foot-wide, privately owned, right-of-way route "adjacent to and crossing Lake Pend Oreille" in north Idaho since before 1890 statehood. "Whether BNSF or the state of Idaho owns the bed and banks of Lake Pend Oreille," IDL director Groeschl

asserts that his final order must only “recognize BNSF’s right to utilize the right-of-way for construction of a railroad bridge and associated fill.” Through the final and preliminary orders’ apparent dismissal of local concerns over this project, railroad pursuit of profit, at the expense of rail line communities’ environmental and economic wellbeing, unfortunately persists in the Idaho Panhandle, in stark contrast to state of Idaho obligations to uphold the public trust.

Responsibly reviewing and analyzing this IDL permit decision, WIRT activists are especially alarmed by final/preliminary order statements about project effects on water quality:

“As to protection of water quality, there were general comments made regarding impacts due to coal dust and possible spills...Those concerns, while well taken, are addressed through comments from [the Idaho departments of environmental quality (DEQ) and fish and game (F&G)]...Comments from F&G further address water quality concerns: ‘Potential containment re-suspension associated with pile driving and removal is not expected to affect water quality, thus sediment core samples were not required under the draft 401 Water Quality Certification.’”

We challenge the legality of IDL approving an encroachment permit prior to the Idaho Department of Environmental Quality issuing, waiving, or denying Clean Water Act-required final water quality certification and associated restrictions and conditions placed on BNSF plans. IDL and other state agencies have not fully acknowledged and acted in accordance with testifiers’ concerns for risks to water quality from project construction and subsequent operation, but

could arrange and enforce independent, core sample collection and analysis of train-spewed, lake bed, coal and other deposits in BNSF's private right-of-way, before bridge builders drill almost 1000 piles into them and release more pollution into regional, lake and aquifer, drinking water.

In May 2015, IDEQ completed a Source Water Assessment Summary Report that evaluates the Sandpoint Public Works Department's Lake Pend Oreille drinking water system that "serves approximately 9,620 people through 3,300 connections." The state agency updated its report in August 2016, with potential contaminant information, including data listed under "Railroad" in an enclosed chart that reveals that Burlington Northern Santa Fe, Montana Rail Link, Pend Oreille Valley, and Union Pacific railroads currently pollute the lake's surface water with inorganic chemicals (IOC), volatile organic chemicals (VOC), and synthetic organic chemicals (SOC). Lake water already receives "auto-high," final susceptibility ranking scores for these three classes of chemicals and microbial contaminants, entering the lake from potential contaminant sources noted as "Montana [Rail] Link Railroad [operated in Idaho by BNSF], U.S. Highway 95, and a remediation site all within 1000 feet of intake." A second rail bridge would only compound this pollution of a critical water source, the largest lake in Idaho.

"Several situations cause automatic assignment of a high susceptibility score: 1) any detection of a VOC or SOC, 2) detection of an IOC at a concentration greater than the drinking water maximum contaminant level set by EPA, or 3) a confirmed microbial detection at the drinking water source, or 4) the

presence of potential contaminant sources within 50 feet of a well or 1000 feet of a surface water intake.”

IDL also seems to have bypassed an administrative, contested case hearing AFTER permit issuance, by holding two public hearings overseen by a hearing officer, in Ponderay and Sandpoint, Idaho, on May 23, 2018, and is pushing the public participation process into lower judicial courts, with an appeal filing deadline of Saturday, July 21. Obligated to protect the Lake Pend Oreille water, air, and land resources essential to our existence, we believe that our community should resist each advance of this BNSF proposal, by disputing its permits through every available local, state, and federal court system and other creative resistance.

ERRORS OF APPLICATION

A few examples of many errors in the BNSF encroachment permit application L-96-S-0096E involve Lake Pend Oreille bridge pier pile driving activities and their significant impacts on surrounding, above-surface, and underwater noise levels in the critical habitat of the threatened species bull trout and near Sandpoint businesses, homes, and resident and visitor recreation. According to the encroachment application, BNSF is planning to build two bridges over Lake Pend Oreille, by driving up to 988 piles into the lake bed, then removing up to 700 of them upon completion of the three-year-plus, \$100 million project. The new, 18-foot-wide, 4,874 foot-long, permanent, second, lake rail bridge, approximately 50 feet west of the existing, 16-foot-wide, train bridge, would consist of 49 mostly 104-foot-long spans supported by 288 36-inch-

diameter, steel pipe pilings. The new bridge piers would match the horizontal alignment and span clearances of the majority of the existing bridge piers.

But BNSF plans to also build a temporary, timber-deck, construction bridge immediately adjacent and west of the new bridge, to hold large cranes weighing 100 to 250 tons. The 32-foot-wide, 4,800-foot-long, temporary bridge would cover twice as many (101) spans only 48 feet long, include eight 64-foot-wide, staging set-outs at 500-foot intervals along the bridge, and access the Dog Beach Park staging area with a 24-foot-long span at the north end. Half-width, temporary bridge spans would not only endanger westbound boat navigation, but require the support of 137 piers consisting of up to 700 24-inch-diameter, steel piles driven into the lake.

Immediately after placement of nearshore, approach fills, and generally prior to construction of the new rail bridge, BNSF proposes to start building the temporary bridge in fall 2018 and keeping it in the lake for up to three years. Work on the permanent railroad bridge could begin while the temporary bridge is dangerously incomplete, and could occur year-round after it is finished.

Installing one open-ended, 24- to 36-inch-diameter pile in two to three hours, with an average 1,600 strikes from an impact hammer, and two to three piles during the daylight hours of each working day, pile driving could last from 329 to 494 cumulative days (which the application grossly underestimates), except during weather and other interruptions. Unmitigated, 150- to 206-decibel, pile driving noise would disturb terrestrial and aquatic inhabitants, including area osprey and Endangered Species Act-listed, threatened bull trout (*Salvelinus*

confluentus) vulnerable to underwater, sound pressure changes. “Potential behavioral effects to bull trout could extend 4.57 miles northeast to Oden Bay and 4.44 miles southwest to the Pend Oreille River near the City of Dover, at the lake’s outlet.”

Besides noise, pile driving typically generates localized sediment displacement and water turbidity. But the use of air bubble curtains to contain noise temporarily mobilizes even higher amounts of sediment and increases turbidity, which “can cause stress responses in bull trout, such as gill flaring, coughing, avoidance, and an increase in blood sugar levels.” Inserting and removing up to 988 temporary and permanent bridge piles into and close to the coal dust and chunks deposited by coal trains using the existing rail bridge would further degrade Lake Pend Oreille water quality, close to the water intake facility that serves over 9,000 regional residents.

Despite these application errors and admitted, significant, project impacts to an endangered species and other public interests, the final and preliminary orders approving encroachment permit L-96-S-0096E have not required any modifications or amendments to the BNSF application.

ADDITIONAL INPUT

We reserve and maintain the rights to offer further evidence from this record and other information and citations supporting our claims, and to include other aggrieved parties who appeared at the public hearings on case PH-2018-PUB-20-001 as plaintiffs, testifiers, witnesses, and amicus partners, and to provide further participation in this Court’s review of this case through advice,

assistance, and/or representation by attorney(s) licensed to practice law in Idaho and elsewhere in the U.S.

PETITIONS FOR RELIEF

The Plaintiffs request the First Judicial District Court for the State of Idaho and Bonner County to conduct rigorous reviews and analyses of the entire Idaho Department of Lands and Idaho Board of Land Commissioners record, proceedings, findings of fact, conclusions of law, preliminary order, and final order regarding BNSF encroachment permit application L-96-S-0096E and hearings case PH-2018-PUB-20-001. We further ask the Court to defer to pending, state and federal, public participation processes and agency decisions resulting from environmental reviews, assessments, and/or impact statements and studies of this project that still requires Clean Water Act-mandated water quality certification from the Idaho Department of Environmental Quality, dredge, fill, and wetland impact approval from the U.S. Army Corps of Engineers, and bridge permits from the lead, federal agency, the U.S. Coast Guard. As plaintiffs directly impacted by the outcomes of this permit decision, we also motion that, based on the results of this Court's review, the Idaho Department of Lands and Idaho Board of Land Commissioners require appropriate revision, denial, and/or revocation of the negligent and culpable, BNSF Sandpoint Junction Connector Project application and permit. We hope for an eventual judgment entered in favor of the Plaintiffs, with reimbursements of bonds and recovery of any other lawsuit expenses of the Plaintiffs, which the Court may deem reasonable and just.

DATED: July 20, 2018

Signed and respectfully submitted by:

Helen Yost

Wild Idaho Rising Tide

Hand-delivered on July 20, 2018, to the District Court for the First Judicial District
for the State of Idaho, Bonner County

Sent on July 20, 2018, to the Plaintiffs via email message and attachment, with a
request for confirmation of receipt