

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

| | | |
|-----------------------------------|---|-------------------------|
| SIERRA CLUB, a California |) | |
| nonprofit corporation; |) | |
| PUGET SOUNDKEEPER ALLIANCE, a |) | CASE NO. C13-00967JCC |
| Washington nonprofit corporation; |) | |
| RE SOURCES FOR SUSTAINABLE |) | SEATTLE, WASHINGTON |
| COMMUNITIES, a Washington |) | November 15, 2016 |
| nonprofit corporation; |) | |
| COLUMBIA RIVERKEEPER, a |) | STATEMENT OF SETTLEMENT |
| Washington nonprofit corporation; |) | |
| FRIENDS OF THE COLUMBIA GORGE, |) | |
| INC., dba FRIENDS OF THE |) | |
| COLUMBIA GORGE, an Oregon |) | |
| nonprofit corporation; |) | |
| SPOKANE RIVERKEEPER; NATURAL |) | |
| RESOURCES DEFENSE COUNCIL, a |) | |
| New York nonprofit corporation, |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | |
| |) | |
| BNSF RAILWAY COMPANY, |) | |
| a Delaware corporation, |) | |
| |) | |
| Defendant. |) | |
| |) | |

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN C. COUGHENOUR
UNITED STATES DISTRICT JUDGE

APPEARANCES:**For the Plaintiffs:**

CHARLES M. TEBBUTT
SARAH A. MATSUMOTO
DANIEL C. SNYDER
Law Offices of Charles M. Tebbutt, PC
941 Lawrence Street
Eugene, OR 97401

JESSICA YARNALL LOARIE
Sierra Club Environmental Law Program
85 Second Street, 2nd Floor
San Francisco, CA 94105

ANDREA KATHRYN RODGERS
Western Environmental Law Center
3026 NW Esplanade
Seattle, WA 98117

JESSICA L. YARNALL LOARIE
Sierra Club
85 Second Street, 2nd Floor
San Francisco, CA 94110

For the Defendant:

DENISE L. ASHBAUGH
Yarmuth Wilsdon PLLC
1420 5th Avenue, Suite 1400
Seattle, WA 98101

FRED R. WAGNER
ERIC L. KLEIN
Beveridge & Diamond
1350 I Street NW, Suite 700
Washington, DC 20005

MEGAN L. MORGAN
TIMOTHY M. SULLIVAN
Beveridge & Diamond PC
201 N. Charles Street, Suite 2210
Baltimore, MD 21201-4150

Reported by:

NANCY L. BAUER, CCR, RPR
Federal Court Reporter
700 Stewart Street, Suite 17205
Seattle, WA 98101
(206) 370-8506
nancy_bauer@wawd.uscourts.gov

1 November 15, 2016

8:30 a.m.

2 PROCEEDINGS

3 THE COURT: So what's happening?

4 MR. WAGNER: Good morning, Your Honor.

5 The parties have consulted last night, and we do have an
6 agreement in principle.

7 What I'd like to seek guidance and make request, there is
8 a couple of ways to proceed. We can discuss the general
9 parameters of any sort of agreement with you consistent with
10 the seven protocols off the record, and then simply announce
11 the generic agreement in principle on the record. I didn't
12 know what you preferred.

13 THE COURT: You don't need to discuss the terms with
14 me. If the parties are satisfied, I'm satisfied.

15 What I would suggest is that you state now the agreement
16 in principle on the record, and then I'd like to make some
17 comments that I think both of your clients might like to
18 hear. Okay?

19 MR. WAGNER: All right. Very good. We just need one
20 moment because we're just ironing out one or two phrases, and
21 then I'll be ready to proceed.

22 THE COURT: Let me go ahead and make my comment.

23 When I first got this case, I confess I discussed it with
24 my wife, and she said, "Well, it seems to me that there is a
25 simple solution: Put covers on the cars." And when I first

1 started reading the briefs, I'm saying to myself, "Well, that
2 makes a lot of sense."

3 And I'm sure that for the plaintiffs, they will have a
4 hard time understanding any result, settlement or otherwise,
5 that doesn't include an immediate order from the court that
6 there be covers placed on the cars.

7 The fact of the matter is that as much as I might like to
8 have the power to order that, I don't. The law is such
9 that -- and as I studied it more, I understand why the law is
10 as it is. But the law is such that, for me, as a district
11 judge here in Washington State, to tell one railroad in a
12 national system of railroads how they have to run their
13 railroad is not what the law permits.

14 Having said that, the more I looked at the case, the more
15 I thought that if we finish this trial, neither side is going
16 to be very happy with the way it's going to end up, and that
17 the ability to do something that is a win-win for everybody
18 in the case is enhanced substantially through the process
19 that the lawyers and the clients have engaged in for the last
20 few days; that is to sit down as reasonable people and try to
21 come up with a solution that will help the rivers and the
22 Sound, but also be something that both sides can live with.

23 And what I wanted to say in particular, and I would urge
24 you to make these comments known to your clients, and use
25 them as you wish, I want to commend both sides. I want to

1 commend the BNSF and its leadership for being responsible and
2 working hard to come up with a solution that would satisfy
3 the important considerations that the plaintiffs have pursued
4 in the case.

5 And I also want to commend plaintiffs and their counsel
6 for the extraordinary amount of effort that has been expended
7 on this case and the quality of the representation that the
8 plaintiffs received from their attorneys. If we didn't have
9 good, high-quality lawyers on both sides, this case could
10 never have been resolved short of a judgment.

11 But the fact that we have the kind of lawyers that we've
12 had in this case made this possible, and I want to express
13 the appreciation of the court for the professional way that
14 all of you have behaved by and large in this case.

15 So work out your phrases, and then give me a call and I'll
16 come out, and we'll put it on the record.

17 (Court in recess.)

18 MR. WAGNER: Good morning once again, Your Honor.
19 Again, for the record, Fred Wagner for BNSF Railway Company.

20 If I can, just a word of thanks for the comments you
21 offered, and also thank you for your patience over the course
22 of the trial and also your patience for allowing our trial
23 team to get a full and fair opportunity to appear before you.
24 It is important to me to give everybody on our team a chance
25 to appear in court, and you expressed great patience for

1 that, and I really appreciate it.

2 Your Honor, the parties have reached an agreement in
3 principle, and the general contours have been set forth in a
4 brief agreement. This will be then memorialized in a more
5 formal consent decree that the parties will file with the
6 court, and then there is a period of review before entering,
7 as you're aware.

8 The parties have tentatively recommended a 60-day stay of
9 the litigation to allow us to conclude those negotiations in
10 writing, in part because of the holidays and things, to get
11 you something 60 days from adjournment, if that happens
12 today. So the procedural next step --

13 THE COURT: That's fine.

14 MR. WAGNER: The agreement in principle is that,
15 first, BNSF and the plaintiffs agree that BNSF Railway
16 Company is not admitting to any violations of the Clean Water
17 Act.

18 BNSF shall commit to a two-year cooperative study on the
19 commercial and operational feasibility of car covers for
20 open-top coal and petcoke cars.

21 BNSF will share information with plaintiffs, subject to
22 reasonable non-disclosure agreements.

23 Next, if BNSF determines that car covers are commercially
24 and operationally feasible after the study, then BNSF shall
25 add the option of car covers to the safe harbor provision of

1 the Coal Loading Rule.

2 And next, if BNSF determines that car covers are
3 commercially and operationally feasible after the study, BNSF
4 shall publicize the results at regular industry conferences
5 and events for two years thereafter. Plaintiffs will receive
6 copies of materials presented at those meetings.

7 MR. TEBBUTT: Those were the first four points, and
8 I'm going to just identify them by number moving forward just
9 so this isn't one run-on agreement.

10 THE COURT: All right.

11 MR. TEBBUTT: Item 5: BNSF shall pay \$1 million for
12 supplemental environment projects in the state of Washington.

13 6: The parties will settle this matter through entry of a
14 consent decree.

15 7: BNSF shall remove coal and petcoke at locations to be
16 identified by the parties in the consent decree, as
17 established through trial and designated deposition testimony
18 and exhibits. The parties will create an appendix to the
19 final consent decree, describing those sites and locations.
20 Removal will focus only on areas with significant
21 accumulation at said sites using vacuuming or other
22 noninvasive techniques. The means and methods used by BNSF
23 to address significant accumulation are at its sole
24 discretion.

25 7A: BNSF shall remove coal and/or petcoke at the specific

1 locations one time upon entry of the consent decree and will
2 provide documentation to plaintiffs concerning that removal.
3 Plaintiffs retain the right to object to BNSF's cleanup
4 efforts and, if not resolved by the parties, to be able to
5 bring the matter to the court.

6 7B: BNSF shall conduct two annual inspections of the
7 aforementioned sites after completing its original removal.
8 If the sites have accumulated significant quantities of coal
9 and/or petcoke, BNSF shall remove that material. BNSF will
10 provide plaintiffs with a report of its inspection.
11 Plaintiffs retain the right to object to BNSF's efforts, and
12 if not resolved by the parties, to be able to bring the
13 matter to the court.

14 8: Plaintiffs will release BNSF systemwide for all claims
15 that were or could have been brought in this litigation and
16 covenant not to sue under the Clean Water Act or analogous
17 state law or any common law theory on the theory of material
18 leaving open-top rail cars and entering waters of the United
19 States or waters of any state for any events or occurrences
20 arising over the next five years.

21 And ninth, the last term: BNSF will respond to any fee
22 petition filed by plaintiffs after entry of the consent
23 decree.

24 THE COURT: All right.

25 MR. TEBBUTT: And, Your Honor, I would like to, of

1 course, thank the court as well for its patience. We have
2 some -- you know, a team of attorneys here who we thank the
3 court for its words and who have done an excellent job in
4 helping to prepare the case, and some young attorneys who get
5 some trial experience. I believe Your Honor is always
6 enjoying to see young attorneys practice before this court,
7 and we thank you for your efforts.

8 THE COURT: All right. Well, thank you so much.
9 We'll be in recess.

10
11 (The proceedings concluded at 8:51 a.m.)
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

I, Nancy L. Bauer, CCR, RPR, Court Reporter for the United States District Court in the Western District of Washington at Seattle, do hereby certify that I was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I have caused said stenographic notes to be transcribed under my direction and that the foregoing pages are a true and accurate transcription to the best of my ability.

Dated this 15th day of November 2016.

/S/ Nancy L. Bauer

Nancy L. Bauer, CCR, RPR
Official Court Reporter