

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,
THE STATE OF NEW MEXICO, and
THE NEW MEXICO OFFICE OF
NATURAL RESOURCES TRUSTEE,

04 JAN 14 PM 3:18

CLERK-SANTA FE

Plaintiffs,

v.

CIV - 03 - 1105 MV KBM
No. _____

THE BURLINGTON NORTHERN and
SANTA FE RAILWAY COMPANY,

Defendant.

CONSENT DECREE

I. INTRODUCTION

A. This Consent Decree is entered into by and among Plaintiff United States of America ("United States"), on behalf of the United States Department of the Interior, United States Fish and Wildlife Service ("DOI"); Plaintiff The State of New Mexico ("State"); Plaintiff The New Mexico Office of Natural Resources Trustee ("NMONRT"); and Defendant The Burlington Northern and Santa Fe Railway Company ("BNSF" or "Settling Defendant").

B. The United States, the State and NMONRT have filed a Complaint against BNSF pursuant to Section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a), seeking to recover damages for injury to, destruction of, or loss of Natural Resources resulting from the release of hazardous substances at or from the AT & SF (Clovis) New Mexico Superfund Site, located in Clovis, Curry County, New Mexico ("Site").

C. The DOI and NMONRT (collectively "Trustees") share trusteeship of the natural resources and are coordinating restoration efforts. The parties to this Decree ("Parties") desire to enter into this Decree, as a compromise of a disputed claim, to settle the claims asserted in the Complaint. Pursuant to this Consent Decree, Settling Defendant, without admitting any liability, agrees to make a payment to the Trustees for use by the Trustees to: (1) restore, replace or acquire natural resources equivalent to those allegedly injured, destroyed or lost resulting from releases at the Site and; (2) reimburse the Trustees for costs previously incurred to assess the alleged injury to, destruction and/or loss of natural resources, and Plaintiffs have determined that the payment by Settling Defendant and the allocation between Trustees are appropriate actions sufficient for these uses and purposes.

D. The Parties agree and this Court, by entering this Consent Decree, finds that this Consent Decree has been negotiated by the parties in good faith, that settlement of this matter will avoid prolonged and complicated litigation between the Parties, and that the Consent Decree is fair, reasonable, consistent with the purposes of CERCLA, and in the public interest.

THREFORE, with the consent of the Parties to this Decree, IT IS ORDERED,
ADJUDGED, AND DECREED:

II. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C. §§ 9607 and 9613(b). Venue is proper in this District pursuant to 38 U.S.C. § 1391(b) and 42 U.S.C. § 9613(b). This Court has personal jurisdiction over Settling Defendant. Solely for purposes of entry and enforcement of this Consent Decree, Settling Defendant waives all objections and defenses that it may have to jurisdiction of the

Court or to venue in this District. The Parties shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

2. This Consent Decree applies to and is binding upon the United States, the State, the NMONRT, any successor agencies and upon the Settling Defendant and its successors and assigns. Any change in ownership or corporate status of Settling Defendant, including, but not limited to, any transfer of assets or real or personal property, shall in no way alter Settling Defendant's responsibilities under this Consent Decree.

IV. DEFINITIONS

3. Unless otherwise expressly provided herein, terms used in this Consent Decree shall have the meanings assigned to them in CERCLA, 42 U.S.C. § 9601 et seq., or in regulations promulgated under CERCLA. Whenever terms listed below are used in this Consent Decree, the following definitions shall apply:

a. "AT & SF (Clovis) New Mexico Superfund Site," or "Site," means the former Santa Fe Playa Lake and its immediate surrounding area, located near Clovis, Curry County, New Mexico, which is depicted on the map attached hereto as Exhibit 1.

b. "CERCLA" means the Comprehensive Environmental Response Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601 et seq.

c. "DOP" means the United States Department of the Interior and any successor departments or agencies of the United States.

d. "DOJ" means the United States Department of Justice and any successor departments or agencies of the United States.

e. "Natural Resources" means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson-Stevens Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.]) any State or local government, any foreign government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe.

f. "Natural Resource Damages" means damages for injury to, destruction of, or loss of Natural Resources, including the reasonable costs of assessing such injury, destruction, or loss.

g. "Parties" means the parties to this Consent Decree.

h. "Trustees" means the United States Department of the Interior, United States Fish and Wildlife Service, and the State of New Mexico Office of Natural Resources Trustee ("NMONRT").

i. "Settling Defendant" or "BNSF" means The Burlington Northern and Santa Fe Railway Company, and for purposes of Sections IX, X and XIII of this Consent Decree includes: (1) directors and officers of BNSF, to the extent that their alleged liability arises from actions taken in their official capacities as directors and officers of BNSF; (2) The Atchison, Topeka & Santa Fe Railway Company; and (3) successors to BNSF, to the extent that their alleged liability arises from their status as successors to BNSF.

V. PAYMENT.

4. Within 45 days of entry of this Consent Decree, Settling Defendant shall pay to the Trustees the sum of four hundred eighty-nine thousand dollars (\$ 489,000). Payment shall be

made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice ("DOJ") Account in accordance with EFT procedures, referencing USAO File No. 2003-00580 and DOJ Case No. 90-11-1-07321. Payment shall be made in accordance with instructions provided to Settling Defendant by the Financial Litigation Unit of the United States Attorney's Office for the District of New Mexico following lodging of the Consent Decree. Any payments received after 4:00 p.m. Eastern Time shall be credited on the next business day. Notice that payment has been made shall be provided to DOI, the State, NMONRT and DOJ in accordance with Paragraph 21 (Notices and Submissions), below, shall reference DOJ Case No. 90-11-1-07321, and shall state that payment is for Natural Resource Damages with respect to the AT & SF (Clovis) New Mexico Superfund Site, located in Clovis, New Mexico.

5. Of the principal amount paid pursuant to Paragraph 4, the sum of four hundred fifty-nine thousand dollars (\$ 459,000) shall be placed by DOJ in a court registry trust account for use by the Trustees jointly to plan and implement a wetland acquisition and enhancement project designed to restore, replace and/or acquire the equivalent of Natural Resources injured, destroyed or lost as a result of the release of hazardous substances at or from the Site ("Wetland Enhancement Payment").

6. Of the principal amount paid pursuant to Paragraph 4, the sum of twenty thousand, five hundred dollars (\$ 20,500) shall be paid by DOJ to DOI to reimburse DOI for costs it previously incurred to assess the injury to, destruction or loss of Natural Resources resulting from the release of hazardous substances at the Site ("DOI Assessment Payment").

7. Of the principal amount paid pursuant to Paragraph 4, the sum of nine thousand, five hundred dollars (\$ 9,500) shall be paid by DOJ to NMONRT to reimburse NMONRT for costs it

previously incurred to assess the injury to, destruction or loss of Natural Resources resulting from the release of hazardous substances at the Site ("NMONRT Assessment Payment").

VI. INTEREST

8. In the event that Settling Defendant fails to timely pay the full amount required to be paid under Paragraph 4, above, Settling Defendant shall pay to DOJ Interest on the unpaid principal amount in accordance with 28 U.S.C. § 1961. Interest shall accrue on any unpaid principal amount from and including the 45th day following the date of entry of the Consent Decree, until and including the day full payment of the remaining principal balance, interest accruing under this Paragraph, and any stipulated penalties assessed under Paragraph 9, below, is received by the United States. Payment of interest due shall be made in the manner directed by the United States and NMONRT. Interest shall be allocated among the Wetland Enhancement Payment, the DOI Assessment Payment and the NMONRT Assessment Payment in accordance with the proportions that the payment amounts specified in Paragraphs 5, 6 and 7 bear to the total payment required by Paragraph 4. Settling Defendant shall be liable for attorneys' fees and costs incurred by the United States and NMONRT to collect any amount due under this Consent Decree.

VIII. STIPULATED PENALTIES

9. If Settling Defendant fails to make the full payment required by Paragraph 4, above, Settling Defendant shall pay to DOJ, in addition to the unpaid principal balance and accrued interest, a stipulated penalty in the amount of \$ 3,000.00 for each day that the payment is late. Any stipulated penalties for failure to make the payment required by Paragraph 4 shall be allocated among the Wetland Enhancement Payment, the DOI Assessment Payment and the

NMONRT Assessment Payment in accordance with the proportions that the payment amounts specified in Paragraphs 5, 6 and 7 bear to the total payment required by Paragraph 4.

10. Stipulated penalties shall be due and payable within thirty days of Settling Defendant's receipt from the United States or NMONRT of a demand for payment of Stipulated Penalties. Payment of stipulated penalties shall be made in the manner directed by the United States and NMONRT. Notwithstanding any other provision of this Consent Decree, the United States and NMONRT may waive payment of Stipulated Penalties.

IX. COVENANTS NOT TO SUE

11. In consideration of the payment made by Settling Defendant in accordance with this Consent Decree, and except as specifically provided in Section X (Non-Waiver Provisions), below, the United States, the State and NMONRT each hereby covenant not to sue or to take any other civil or administrative action against Settling Defendant to recover Natural Resource Damages resulting from past releases of hazardous substances or other substances at or from the Site, pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9607(a)(4), the Oil Pollution Act ("OPA"), 33 U.S.C. §§ 2702 and 2707, the Clean Water Act, 33 U.S.C. § 1321, or any other applicable federal or state statutory or common law.

12. These covenants not to sue are conditioned upon payment, and shall not take effect until receipt by the United States and NMONRT of all funds required to be paid by Settling Defendant under the terms of this Decree. These covenants not to sue extend only to the Settling Defendant and do not extend to any other person.

13. In consideration of the covenant not to sue contained in Paragraph 11, Settling

Defendant agrees not to assert any claims or causes of action against the United States, including any department, agency or instrumentality of the United States, the State, including any department, agency or instrumentality of the State, or NMONRT related to Natural Resources Damages resulting from past releases of hazardous substances or other substances at or from the Site, pursuant to CERCLA Section 113(f), 42 U.S.C. § 9613(f), the Oil Pollution Act, 33 U.S.C. § 2701 et seq., or any other applicable federal or state statutory or common law.

X. NON-WAIVER PROVISIONS

14. Nothing in this Consent Decree shall be construed to relieve the Settling Defendant or its officers, agents, servants, employees, successors, or assigns of their obligations to comply with all applicable federal, state and local statutes and regulations, including, but not limited to CERCLA.

15. Notwithstanding any other provision of this Consent Decree, the United States, the State and NMONRT each reserve, and this Consent Decree is without prejudice to:

a. Any and all rights of the United States, the State and NMONRT to institute proceedings against Settling Defendant in this action or in a new action seeking to require BNSF to reimburse the United States, the State or NMONRT for additional Natural Resource Damages if:

(1) conditions with respect to the Site, unknown to the United States, the State or NMONRT at the date of lodging of this Decree, that have resulted in releases of hazardous substances at or from the Site, are discovered after the date of lodging of this Decree; or

(2) information with respect to the Site, unknown to the United States, the State or NMONRT at the date of lodging of this Decree, is received after the date of lodging of the

Decree;

and such conditions or information indicate that there is injury to, destruction of, or loss of Natural Resources of a type that was unknown, or of a magnitude greater than was known, to the United States, the State or NMONRT at the date of lodging of this Decree. For purposes of this Paragraph 15, conditions and information unknown to the United States, the State or NMONRT do not include any conditions or information set forth in the EPA Superfund Record of Decision for the Site dated September 23, 1988, in the administrative record on which the Record of Decision was based, or in the documents listed in Exhibit 2 to this Consent Decree.

b. Any and all rights against the Settling Defendant with respect to all other matters not specifically included in the covenant not to sue, including but not limited to the following:

(i) claims other than claims for Natural Resource Damages, against the Settling Defendant that the United States, the State or NMONRT may have under Sections 106 and 107 of CERCLA, 42 U.S.C. § 9606 and § 9607;

(ii) claims based on a failure by Settling Defendant to meet a requirement of this Consent Decree;

(iii) liability arising from the past, present, or future disposal, release, or threat of release of hazardous substances outside of the Site;

(iv) liability for the disposal of any hazardous substances taken from the Site; and,

(v) criminal liability.

16. Notwithstanding any other provision of this Consent Decree, this Consent Decree is without prejudice to all rights of the Settling Defendant with respect to all matters other than those expressly specified in the covenants not to sue set forth in Paragraph 13. In the event that

the United States, the State or the NMONRT exercises its rights pursuant to Paragraph 15, and except as provided in Paragraph 19, the Settling Defendant reserves the right to assert any defenses that it may have with respect to the matters raised by the United States, the State or the NMONRT pursuant to Paragraph 15.

17. This Consent Decree does not limit or affect the rights of the United States, the State, NMONRT or the Settling Defendant as against any third party. Except as set forth in Paragraph 18, this Consent Decree does not limit the rights of any entity, not a party to this Consent Decree, against Settling Defendant.

18. The Parties hereto agree that Settling Defendant is entitled, as of the receipt by the United States of all funds required to be paid under the terms of this Decree, to protection from contribution actions or claims as provided by CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2), or by applicable state law, for all matters addressed in this Consent Decree. The matters addressed in this Consent Decree are Natural Resource Damages which result from the release of hazardous substances at or from the Site.

19. In any subsequent administrative or judicial proceeding initiated by the United States, the State or NMONRT against Settling Defendant relating to the Site, Settling Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim splitting, or other defenses based upon any contention that the claims raised by the United States, the State or NMONRT in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Paragraph 11, above.

20. Nothing in this Consent Decree shall be deemed to limit the response authority of the United States or any agency of the State of New Mexico under federal or state law.

XI. NOTICES AND SUBMISSIONS

21. Notices required by this Decree shall be made as follows:

a. To DOI:

Bruce Nesslodge
United States Department of the Interior
Attn: Restoration Fund Manager
1849 C Street, NW
Mailstop 4449
Washington, DC 20240

Karen Cathey, NRDA Coordinator
United States Fish and Wildlife Service
P.O. Box 1386
Albuquerque, NM 87103

b. To DOJ:

Chief
Environmental Enforcement Section
United States Department of Justice
Environmental Enforcement Section
P.O. Box 7611
Ben Franklin Station
Washington, DC 20005

c. To the State:

Office of the New Mexico Attorney General
P.O. Drawer 1508
Baatán Memorial Building
Santa Fe, New Mexico 87504

d. To NMONRT:

Trustee
New Mexico Office of Natural Resource Trustee
610 Gold Avenue, SW, Suite 236
Albuquerque, NM 87102

Office of the New Mexico Attorney General
P.O. Drawer 1508
Bataan Memorial Building
Santa Fe, New Mexico 87504

e. To Settling Defendant:

The Burlington Northern and Santa Fe Railway Company
Vice President of Law
2500 Lou Menk Drive
AOB, 3rd Floor
Ft. Worth, Tx. 76131

XII. RETENTION OF JURISDICTION

22. This Court shall retain jurisdiction over the subject matter and the Parties for the purpose of enforcing this Consent Decree until the United States and NMONRT have received all payments required to be made under this Consent Decree.

XIII. PUBLIC COMMENT

23. The Parties agree and acknowledge that final approval by the United States, the State and NMONRT and entry of this Consent Decree are subject to a thirty (30) day period for public notice and an opportunity for public comment. The United States, the State and NMONRT each reserve the right to withdraw or withhold consent if the public comments regarding the Consent Decree disclose facts or considerations which indicate that the Consent Decree is inappropriate, improper, or inadequate. Settling Defendant consents to the entry of this Consent Decree without

further notice.

24. If consent is withdrawn pursuant to Paragraph 23, or if for any reason the Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

XIV. EFFECTIVE DATE

25. This Consent Decree is effective upon the date of its entry by the Court.

XV. SIGNATORIES/SERVICE

26. Each undersigned representative of a party to this Consent Decree certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind its respective party to this document.

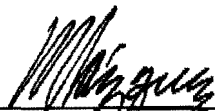
27. The Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree unless the United States, the State or NMONRT notifies them in writing that it no longer supports entry of the Consent Decree.

28. The Settling Defendant shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on its behalf with respect to all matters arising under or relating to this Consent Decree. The Settling Defendant hereby agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable rules of this Court, including, but not limited to, service of a summons.

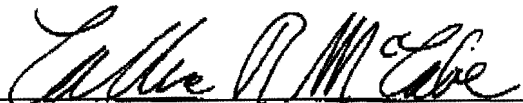
29. This Consent Decree may be executed in any number of counterparts and, as


executed, shall constitute one agreement, binding on all of the parties hereto, even though all of the Parties do not sign the original or the same counterpart.

SO ORDERED THIS 14th DAY OF January, 200.


United States District Judge

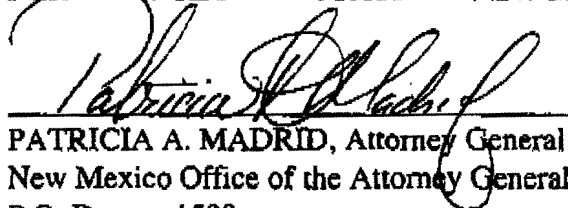
FOR PLAINTIFF UNITED STATES:


CATHERINE R. MCCABE
Deputy Chief, Environmental Enforcement Section
Environment and Natural Resources
Division
U.S. Department of Justice
Washington, DC 30530


NICHOLAS F. PERSAMPIERI
NM Bar No. 3209
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources
Division
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044-7611
Tel. (202) 514-1134

DAVID C. IGLESIAS
United States Attorney
District of New Mexico
P.O. Box 607
Albuquerque, NM 87103-0607

FOR PLAINTIFF THE STATE OF NEW MEXICO:



PATRICIA A. MADRID, Attorney General
New Mexico Office of the Attorney General
P.O. Drawer 1508
Santa Fe, NM 87504-1508
(505) 827-6000

FOR PLAINTIFF THE NEW MEXICO OFFICE
OF NATURAL RESOURCES TRUSTEE:



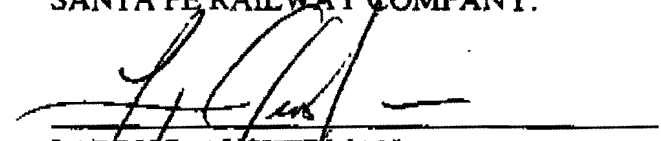
JIM BACA, State Trustee
New Mexico Office of Natural Resources Trustee
610 Gold Avenue, SW, Suite 236
Albuquerque, New Mexico 87102
(505) 243-8087



PATRICIA A. MADRID, Attorney General
New Mexico Office of the Attorney General
P.O. Drawer 1508
Bataan Memorial Building
Santa Fe, New Mexico 87504
(505) 827-6000

United States of America *et. al.* v. The Burlington Northern and Santa Fe Railway Company -
Consent Decree

FOR THE DEFENDANT BURLINGTON NORTHERN and
SANTA FE RAILWAY COMPANY:



LARRY P. AUSHERMAN
Madrill Sperling Roehl Harris & Sisk P.A.
P.O. Box 2168
Albuquerque, NM 87103-2168
(505) 848-1800



MARK P. STEHL
AVP Environmental Research and Development
2500 Lou Menk Drive
00B-2
Fort Worth, Texas 76131
(817) 352-1907

APPROVED AS TO FORM


Senior General Attorney