



State of Wisconsin \ DEP/

BRUCE URBEN, GREEN BAY

Jim Doyle, Governor  
Matthew J. Frank, Secretary

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February 13, 2008

VIA OVERNIGHT MAIL

Russell W. Wilson, Esq.  
Ruder Ware L.L.S.C.  
500 First Street, Suite 8000  
P.O. Box 8050  
Wausau, WI 54402-8050

Subject: Settlement Agreement and Stipulation for Dismissal and Environmental Fund  
Contract and Release – Kewaunee Marsh Arsenic Site

Dear Russ:

Enclosed please find one original fully executed set of the Settlement Agreement and  
Stipulation for Dismissal, District Court Case and Environmental Fund Contract and Release.

The Department and I would like to thank you and the staff of Wisconsin Central and Canadian  
National for your cooperation and willingness to work with us in settling this challenging matter.

Sincerely,

Joseph Wm. Renville  
Attorney  
Bureau of Legal Services

Enclosures

cc: Mary Batt, DOJ (w/enclosures)  
Mark Giesfeldt, (w/enclosures)  
Bruce Urben (w/enclosures)

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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No. 06-C-0472

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WISCONSIN CENTRAL LTD.,

Plaintiff-Appellant,

v.

SCOTT HASSETT and WISCONSIN  
DEPARTMENT OF NATURAL  
RESOURCES,

Defendants-Appellees.

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SETTLEMENT AGREEMENT AND STIPULATION FOR DISMISSAL

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The parties, by their undersigned counsel, enter into this agreement for the purpose of settling litigation on the following terms:

1. This is a final settlement of the appeal of the District Court's ruling, a copy of which is attached as Exhibit 1. During the pendency of this proceeding, Matthew J. Frank has been substituted for Scott Hassett as Secretary of the Wisconsin Department of Natural Resources.

2. As consideration for this settlement agreement, Wisconsin Central Ltd., will (a) pay an amount described in the Environmental Fund Contract and Release, attached as Exhibit 2 to this Settlement Agreement and Stipulation for Dismissal, pursuant to Wis. Stat.

§ 292.11(3), and (b) covenants not to commence any action against the Wisconsin Department of Natural Resources or its officials in state or federal court seeking to recover any costs for the investigation or remediation of arsenic as defined in Section 2.B.(2) of the Environmental Fund Contract and Release (Exhibit 2) or to declare relief from liability pursuant to 16 USC § 1247(d) with respect to any of these costs.

3. The parties acknowledge and agree that in the event (a) the United States Environmental Protection Agency should commence an enforcement action pursuant to federal law against Wisconsin Central Ltd. or the State of Wisconsin Department of Natural Resources, or (b) a third party should commence an action against Wisconsin Central Ltd. or the State of Wisconsin Department of Natural Resources in connection with the site as defined in Environmental Fund Contract and Release (Exhibit 2), nothing in this agreement precludes Wisconsin Central Ltd. or the State of Wisconsin Department of Natural Resources, and its officials, from asserting any applicable law and defenses and seeking contribution from the other party for relief under any law including 16 USC § 1247(d).

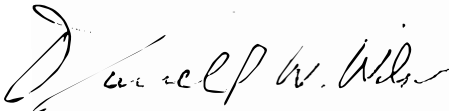
4. Wisconsin Central Ltd.'s compliance with this settlement agreement and stipulation for release and the Environmental Fund Contract and Release (Exhibit 2) shall constitute full satisfaction and release of any liability of Wisconsin Central Ltd. its parent corporations(s), and subsidiaries and its respective shareholders, directors, officers, employees, successors, agents and assigns, or any other person acting on behalf of Wisconsin Central Ltd., for any item waived, released, acquitted or discharged in the Environmental Fund Contract and Release (Exhibit 2).

5. Neither the execution of this Settlement Agreement, nor any terms thereof, may or shall be construed or used as an admission of any liability or wrongdoing or waiver of defenses or as evidence thereof.

6. Accordingly, pursuant to Federal Rule of Appellate Procedure 42(b), this appeal is dismissed, each party to bear its own costs.

Dated this 14<sup>th</sup> day of January 2008.

RUDER WARE



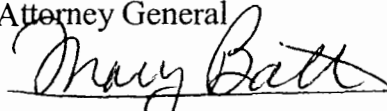
RUSSELL W. WILSON  
State Bar #1017482

Attorneys for Plaintiff

500 Third Street # 700  
Post Office Box 8050  
Wausau, Wisconsin 54402-8050  
(715) 845-4336

Dated this 11<sup>th</sup> day of Jan 2008.

J.B. VAN HOLLEN  
Attorney General



MARY BATT  
Assistant Attorney General  
State Bar #1017859

Attorneys for Defendants

Wisconsin Department of Justice  
Post Office Box 7857  
Madison, Wisconsin 53707-7857  
(608) 266-1001

AO 430 (Rev. 5/85) Judgment in a Civil Case 2

# United States District Court

EASTERN DISTRICT OF WISCONSIN

WISCONSIN CENTRAL LTD.,  
Plaintiff,

## JUDGMENT IN A CIVIL CASE

v.

Case No. 06-C-472

SCOTT HASSETT and  
WISCONSIN DEPARTMENT  
OF NATURAL RESOURCES,  
Defendants.

- Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- Decision by Court.** This action came before the Court for consideration.

**IT IS HEREBY ORDERED AND ADJUDGED** that the defendants' motion to dismiss is granted;

**IT IS FURTHER ORDERED AND ADJUDGED** that this action is dismissed.

Approved: s/ William C. Griesbach  
WILLIAM C. GRIESBACH  
United States District Judge

Dated: October 10, 2006.

SOFRON B. NEDILSKY  
Clerk

s/ Terri Lynn Ficek  
(By) Deputy Clerk

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

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WISCONSIN CENTRAL LTD.,

Plaintiff,

v.

Case No. 06-C-0472

SCOTT HASSETT, and  
WISCONSIN DEPARTMENT OF  
NATURAL RESOURCES,

Defendants.

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**MEMORANDUM AND ORDER**

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Plaintiff Wisconsin Central Ltd. ("WCL") has sued the Wisconsin Department of Natural Resources ("DNR") and its Secretary, Scott Hassett, alleging that they are attempting to impose upon WCL liability for environmental cleanup costs for its former railroad right-of-way in violation of the National Trails System Act (NTSA), 16 U.S.C. § 1241 *et seq.* WCL asserts that this court has subject matter jurisdiction because the action presents a federal question. *See* 28 U.S.C. § 1331.<sup>1</sup> WCL seeks a declaration that it has no liability for the cleanup costs and an injunction against defendants' further efforts to impose such liability. Defendants have moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(1), claiming sovereign immunity as recognized in the Eleventh Amendment, and under Fed. R. Civ.

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<sup>1</sup>WCL also asserts that jurisdiction exists under 28 U.S.C. § 1332 (diversity jurisdiction) and 28 U.S.C. § 1337 (actions involving federal regulation of commerce). However, it concedes in response to defendants' motion that no basis for diversity jurisdiction exists.

P. 12(b)(6) for failure to state a claim upon which relief can be granted. For the following reasons, defendants' motion will be granted.

### BACKGROUND

The complaint alleges that on January 8, 1992, Fox Valley & Western Ltd. ("FV&W"), a wholly-owned subsidiary of WCL, acquired 16.7 miles of railroad trackage located in Kewaunee County, Wisconsin (the "Luxemburg-Kewaunee Line right-of-way"). On April 15, 1998, FV&W filed a petition with the Surface Transportation Board ("STB") seeking exemption under 49 U.S.C. § 10502 from prior approval requirements under 49 U.S.C. § 10903-05 to abandon the Luxemburg-Kewaunee Line right-of-way. On May 19, 1998, the DNR filed a request for issuance of a notice of interim trail use pursuant to the NTSA, 16 U.S.C. § 1247(d), relating to the Luxemburg-Kewaunee Line right-of-way. In conjunction with the petition process, the DNR submitted a statement of willingness to assume financial responsibility for the Luxemburg-Kewaunee Line right-of-way.

On August 3, 1998, the STB issued its decision and notice of interim trail use or abandonment including certain conditions, granting the parties a period of time in which to negotiate an agreement for interim trail use. If no agreement could be reached within the time permitted by the STB, FV&W would have been permitted to abandon the Luxemburg-Kewaunee Line right-of-way completely. Among other conditions, the STB order imposed the following (which it denominated as condition number three):

If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, any legal liability arising out of the transfer or use of (unless the user is immune from liability, in

which case it need only indemnify the railroad against any potential liability), and for {sic} the payment of any and all taxes that may be levied or assessed against, the right-of-way.<sup>2</sup>

On June 25, 1998, WCL (as successor-in-interest to FV&W) entered into an interim trail use/rail banking agreement with the DNR wherein WCL agreed to convey to the DNR "railroad corridors . . . under provisions and authority of the National Trails System Act, 16 U.S.C. § 1247(d)" and "[a]ll rights consistent with fee title purchase, subject to the provisions of the Act." (Compl., Ex. A.) Pursuant to the agreement, WCL executed a quitclaim deed conveying the Luxemburg-Kewaunee Line right-of-way to the DNR. The deed provided that "[t]o the extent provided by law, [the DNR], its successors and assigns, shall assume full responsibility for the management of, any legal liability arising out of the use of, and the payment of any taxes that may be levied or assessed against" the Luxemburg-Kewaunee Line right-of-way. (Compl., Ex. B.) The DNR designated the Luxemburg-Kewaunee Line right-of-way as the "Segment 27 Trail" in the Wisconsin State Trail Network System.

The DNR has been aware of arsenic contamination in the Kewaunee Marsh, through which the Segment 27 Trail runs, since at least 1993. While the parties agree that WCL did not cause the contamination, they dispute who is responsible for remedying it. After a meeting and an exchange of letters failed to resolve the dispute, the DNR on March 23, 2006, requested verification "that WCL intends to take over the treatability study work or that WCL intends to assist with the implementation of the treatability study and how you propose to do so." (Compl., Ex. C at 4.) Absent such verification, the DNR stated that it would "proceed with site activities, continue to conduct the feasibility study, select a remedy and then initiate cost recovery and enforcement actions against WCL." (*Id.*) Claiming that § 1247(d) of the NTSA absolved it from liability from the contamination, WCL commenced this litigation.

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<sup>2</sup>The parties have not provided the court with a copy of the order from which this language apparently comes.



### ANALYSIS

Defendants argue that they are entitled to dismissal on the grounds, *inter alia*, that the action is barred by Eleventh Amendment, no federal question is presented, and the complaint fails to state a claim on which relief can be granted. The first two grounds asserted concern this court's subject matter jurisdiction, and since I find the first dispositive, I need not proceed further.<sup>3</sup> Of course, I note at the outset that in reviewing the plaintiff's complaint in regard to any motion to dismiss, all well-pleaded facts are assumed to be true, and all such facts, as well as the reasonable inferences therefrom, are viewed in the light most favorable to the plaintiff. *Gutierrez v. Peters*, 111 F.3d 1364, 1368-69 (7th Cir. 1997).<sup>4</sup>

Defendants argue that the doctrine of sovereign immunity precludes maintenance of this suit against them. With respect to the DNR, this argument is clearly correct. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) ("It is clear . . . that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment. This jurisdictional bar applies regardless of the nature of the relief sought.") (internal citations omitted). WCL cites *Lister v. Board of Regents* 240 N.W.2d 610 (Wis. 1976), in support of the proposition, accepted by the Wisconsin Supreme Court, that sovereign immunity does not bar suits for declaratory relief against a state agency. However, "[w]hether [a State] permits such a suit to be brought against the State in its own courts is not determinative of whether [the State] has relinquished its Eleventh Amendment immunity from suit in the federal courts." *Edelman v. Jordan*, 415

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<sup>3</sup>"We read the Eleventh Amendment defense as raising a matter of subject matter jurisdiction, and thus properly asserted under Rule 12(b)(1)." *American Soc. of Consultant Pharmacists v. Patla*, 138 F.Supp.2d 1062, 1065 n. 2 (N.D. Ill. 2001) (citing *Marie O. v. Edgar*, 131 F.3d 610, 614 (7th Cir. 1997)).

<sup>4</sup>Exhibits to a pleading are part of the pleading, Fed. R. Civ. P. 10(c), and consideration of such documents does not convert a motion to dismiss into a motion for summary judgment. *Tierney v. Vahle*, 304 F.3d 734, 738 (7th Cir. 2002); *Beanstalk Group, Inc. v. AM Gen. Corp.*, 283 F.3d 856, 858 (7th Cir. 2002).

U.S. 651, 677 n. 19 (1974). This court must look to federal law to determine defendants' immunities, and federal law clearly provides that the DNR is immune from suit. *See also Pennhurst*, 465 U.S. at 100 (“[T]he Court consistently has held that a State's waiver of sovereign immunity in its own courts is not a waiver of the Eleventh Amendment immunity in the federal courts.”). Since the Eleventh Amendment clearly bars WCL's action against the DNR, the defendants' motion will be granted as to that party. But what about Secretary Hassett?

The general rule that a suit against a state official is a suit against the state. In *Pennhurst*, the Court recounted several well-established principles from its prior decisions:

The Eleventh Amendment bars a suit against state officials when the state is the real, substantial party in interest. Thus, the general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter. And, as when the State itself is named as the defendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief.

465 U.S. at 101-02 (internal citations and quotation marks omitted).

The Court in *Pennhurst* also acknowledged, however, that it had recognized “an important exception to this general rule: a suit challenging the constitutionality of a state official's action is not one against the State.” 465 U.S. at 102 (citing *Ex Parte Young*, 209 U.S. 123 (1908)). In *Ex Parte Young*, a federal court enjoined the Attorney General of the State of Minnesota from bringing suit to enforce a state statute that allegedly violated the Fourteenth Amendment. The Supreme Court held that the Eleventh Amendment did not prohibit issuance of this injunction on the theory that an unconstitutional enactment is “void” and therefore does not “impart to [the officer] any immunity from responsibility to the supreme authority of the United States.” 209 U.S. at 160. Since the State could not authorize an illegal action, the officer was “stripped of his official or representative character and [was] subjected to the consequences of his official conduct.” *Id.* Thus, it is clear that under some circumstances, a suit seeking injunctive

relief against a state official acting in his official capacity can proceed. The issue here is whether WCL's lawsuit against Secretary Hassett falls within the *Ex Parte Young* exception.

In *Ameritech Corp. v. McCann*, 297 F.3d 582, 586-87 (7th Cir. 2002), the Seventh Circuit noted that the Supreme Court had provided further guidance as to precisely when the *Ex Parte Young* exception applies. In *Verizon Maryland, Inc. v. Public Service Comm'n of Maryland*, 535 U.S. 635, 645 (2002), the Court stated that “[i]n determining whether the doctrine of *Ex Parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.” Absent such a violation, the suit is barred by the Eleventh Amendment.

Here, no such violation is alleged. At most, WCL alleges that Secretary Hassett intends to seek recovery of the costs of remediating Segment 27 from WCL at some future date. Any such recovery, WCL contends, would violate § 1247(d) of the NTSA. But these allegations do not amount to “an ongoing violation of federal law.” *Verizon*, 535 U.S. at 645. The Secretary has not violated federal law by simply asserting his belief that WCL is the party legally responsible for remediation of the property. And he certainly does not violate federal law by undertaking to have the DNR complete the environmental repair of the site itself. If and when Secretary Hassett brings an enforcement action against WCL, it will represent a one-time effort to recover the costs of the environmental repair. WCL will be free to assert its federal defense to the DNR's claim in the enforcement action. The instant lawsuit is an attempt to forestall such an action by the DNR. This is not the kind of case to which the *Ex parte Young* exception applies.

*Froebel v. Meyer*, 13 F. Supp.2d 843 (E.D. Wis. 1998), a case heavily relied on by WCL, is not to the contrary. In *Froebel*, the plaintiff alleged that as a consequence of its poorly executed removal of a dam, the DNR, two DNR officials and Waukesha County, had violated and were continuing to violate

the federal Clean Water Act, 33 U.S.C. §§ 1251-1387, by discharging pollutants into a river and lake without the requisite permits. As in this case, the State defendants moved to dismiss based on sovereign immunity. The district court granted the motion as to the DNR, concluding that Wisconsin had not consented to be sued in federal court and Congress had not abrogated its immunity in enacting the Clean Water Act. *Froebel*, 13 F. Supp.2d 849-51. However, the court denied the motion as to the two DNR employees, holding that injunctive relief could be available under the *Ex parte Young* exception to the State's immunity under the Eleventh Amendment. Noting that in order for the exception to apply, "the unconstitutional or illegal action complained of must be ongoing in some sense, or capable of being prospectively enjoined," *id.* at 852, the court found the plaintiff had met this requirement by alleging that the defendants' violations were ongoing and continuing at the time he filed the complaint. *Id.*

Likewise, in *Ameritech Corp. v. McCann*, the Seventh Circuit held that a telecommunications company could sue a state prosecutor in federal court to obtain a determination that the prosecutor was required to comply with the Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2510 *et seq.* At issue in that case was the prosecutor's policy of obtaining court orders requiring the company to produce compilations of information detailing the origin of incoming telephone calls to particular customer telephone numbers, and then refusing to pay the cost of obtaining the information. In reversing the district court's dismissal on Eleventh Amendment grounds, the Seventh Circuit noted it was beyond dispute that "Ameritech's complaint alleges an ongoing violation of federal law-McCann's refusal to comply with Section 2706 of the ECPA ...." 297 F.3d at 587. "[S]o long as Ameritech's complaint seeks prospective injunctive relief to cure an ongoing violation of federal law," the Court held, "the Eleventh Amendment poses no bar." *Id.* at 588.

Here, by contrast, the facts alleged suggest a single, isolated dispute between WCL and the State of Wisconsin over whether WCL is responsible for the clean-up costs for its former right-of-way. Even

by WCL's account, there has been no violation of federal law so far, much less an ongoing violation. Absent an ongoing violation of federal law, the *Ex Parte Young* exception does not apply. *Verizon*, 535 U.S. at 645. I therefore conclude that the Eleventh Amendment bars WCL's action against Secretary Hassett, as well as the DNR. Accordingly, the defendants motion will be granted and this action dismissed.

**SO ORDERED** this 10th day of October, 2006.

s/ William C. Griesbach  
WILLIAM C. GRIESBACH  
United States District Judge

**STATE OF WISCONSIN**

**DEPARTMENT OF NATURAL RESOURCES**

**IN THE MATTER OF:**

Kewaunee Marsh Arsenic Site  
C.D. Besadny Wildlife Area &  
Ahnapee State Trail  
Kewaunee County, Wisconsin

**Environmental Fund Contract &  
Release**

**RECITAL**

WHEREAS arsenic contamination exists in and near a portion of the C.D. Besadny Wildlife Area in the Kewaunee Marsh, adjacent wetlands and former rail corridor (Luxemburg-Kewaunee Line right-of-way, also referred to as the Kewaunee Ferry Lead and known as Segment 27 Trail in the Wisconsin Trails System Network) on property owned by the Wisconsin Department of Natural Resources ("WDNR") located in Section 7, Township 23 North, Range 25 East more specifically described as that part of Government Lot 6 and part of the Northwest Quarter of the Southwest Quarter (NW $\frac{1}{4}$ SW $\frac{1}{4}$ ) of sec. 7 described as follows: commencing at the Southwest corner of the Northwest Quarter of the Southwest Quarter (NW $\frac{1}{4}$ SW $\frac{1}{4}$ ) of sec. 7, running thence North on the East line of County Highway "E" to the property formerly owned by the Wisconsin Central Ltd. Railroad Company, thence East at a right angle to said last line to the Kewaunee River, thence Southerly along said river to the South Line of Government Lot 6; thence West on last named line to place of beginning; excepting that portion lying South and West of the former Wisconsin Central Railroad Ltd. property and all that part of Government Lot 7, in the Southeast Quarter of the Southwest Quarter (SE $\frac{1}{4}$ SW $\frac{1}{4}$ ) of sec. 7 and the Southwest Quarter of the Southwest Quarter (SW $\frac{1}{4}$ SW $\frac{1}{4}$ ), lying East of the Main Line Track of the Wisconsin Central Ltd. Railroad, excepting the right of way of the Car Ferry Yard line and switch tracks of the Wisconsin Central Ltd. Railroad also, a parcel of land located in Government Lot 3, Government Lot 6 and the Southwest Quarter of the Southwest Quarter (SW $\frac{1}{4}$ SW $\frac{1}{4}$ ) of sec. 7, described as follows: commencing at the West Quarter corner of sec. 7; thence East along the East-West Quarter section line 1075.81 feet; thence South 10°10'13" West 941 feet more or less to the North line of the South 12 acres of the Northwest Quarter of the Southwest Quarter (NW $\frac{1}{4}$ SW $\frac{1}{4}$ ), the point of real beginning; thence North 10°10'13" East 941 feet more or less to the intersection with the said East-West Quarter section line; thence continue North 10°10'13" East 425.80 feet; thence North 39°34'05" West, 464 feet more or less to the high water line of the Kewaunee River; thence Northeasterly and Southeasterly along said high water line of the Kewaunee river to the intersection with the North line of the South 12.50 acres of Government Lot 6 (Vol. 72, Page 365); thence westerly along said North line of the South 12.50 acres of Government Lot 6 and the North line of that part of the South 12 acres of the Northwest Quarter of the Southwest Quarter (NW $\frac{1}{4}$ SW $\frac{1}{4}$ ) of sec. 7, lying east of the railroad right-of-way to the point of real beginning and on property owned by Wisconsin Central Ltd. ("WCL") more specifically described as that portion of the Wisconsin Central Ltd.'s Luxemburg to Kewaunee, Wisconsin Branch Line right of way and property lying between Railroad Mile Posts 18.9 to 35.6, now discontinued, varying in width on each side of the

Wisconsin Central Ltd.'s Main Track centerline, as formerly located upon, over and across the following described real estate in Kewaunee County, Wisconsin: that portion lying within the Southwest Quarter of the Southwest Quarter (SW $\frac{1}{4}$ SW $\frac{1}{4}$ ) and the Southeast Quarter of the Southwest Quarter (SE $\frac{1}{4}$ SW $\frac{1}{4}$ ) of said sec. 7, all in Township 23 North, Range 25 East, in the Town of Pierce, Kewaunee County, Wisconsin (collectively the "Site"); more particularly identified in the cross-hatched area on the map attached hereto and marked as Exhibit A. In the event of any discrepancy between the legal description contained herein and the cross-hatched area on the map, the cross-hatched area on the map shall prevail. The cross-hatched area on the map includes the heavy, black printed lines contiguous to the cross-hatched area, said lines depicting the railroad right-of-way described herein; and

WHEREAS, approximately 15 acres of the Kewaunee Marsh are contaminated with arsenic that was released to the environment; the WDNR believes that the source of the arsenic is likely a spill on the adjacent railroad corridor that occurred at an unknown time. Arsenic contamination has been found in the soil and groundwater samples collected from soil borings and monitoring wells located both on and off the Site. The Site is contaminated with arsenic at levels that pose a groundwater pathway and direct contact human health risk, and

WHEREAS, the boundaries of the arsenic contamination and the degree and extent of the groundwater contamination on the Site have been substantially defined; and

WHEREAS, both parties to this Environmental Fund Contract and Release ("Contract"), own land in the area affected by the arsenic contamination and neither party caused the release of the contamination on the Site. Previous interim actions were taken at the Site which include site investigation, placing a cap consisting of geo-textile fabric and wood chip/yard waste mixture on the most highly impacted areas, and fencing the area of concern in the marsh to prevent contact; additional remediation is necessary to fully address the significant soil and groundwater contamination and minimize arsenic impact to the groundwater and to the Kewaunee River; and,

WHEREAS, the WDNR beginning in August 2005, conducted a treatability study to evaluate the feasibility of using solidification/stabilization, excavation and disposal, a permeable reactive membrane and other treatment options, to prevent, mitigate or otherwise permanently remedy the release of the arsenic contamination at the Site; and

WHEREAS, the treatability study was completed and the WDNR-Kewaunee Marsh Treatability Project Final Report ("Treatability Report") was issued in August of 2007 which provided recommendations for methods or means to address the arsenic contamination, and

WHEREAS, both parties to this Contract agree that the Treatability Report provides appropriate and adequate options for addressing the arsenic contamination and can be relied on for purposes of this Contract; and

WHEREAS, the WDNR is authorized to take direct action, or enter into a contract with any person to take action, at sites or facilities that may cause or threaten to cause environmental pollution in order to restore the environment to the extent practicable under ss. 292.31(3)(b) and 292.11(7) Wis. Stats., and

WHEREAS, WDNR has determined to take direct action under ss. 292.11(7), 292.31(3)(b), and 292.51 Wis. Stats., at the Site in cooperation with WCL, because the Site presents a

significant danger to public health and welfare and the environment and because no responsible person has yet been willing or able to undertake the necessary remedial action; and

WHEREAS, the WDNR and WCL are currently engaged in a civil matter, Case No. 06-C-0472, which is before the United States Court of Appeals for the Seventh Circuit in which WCL disputes that it is responsible within the meaning of the of the above referenced statutes; and

WHEREAS, the WDNR and WCL have resolved all issues in this matter by executing (a) the Settlement Agreement to which this Environmental Fund Contract and Release is incorporated as Exhibit 2, (b) this Environmental Fund Contract and Release, (collectively the "Settlement Documentation") and wish to have the civil matter dismissed. The WDNR and WCL therefore agree that Case No. 06-C-0472 may be dismissed as set forth in the said Settlement Agreement, and

WHEREAS, in consideration of, and in exchange for, the promises and mutual understandings and covenants contained herein, and intending to be bound legally hereby, WDNR and WCL, by their authorized representatives, have agreed to the execution of this Contract.

NOW, THEREFORE, based upon the above recitals and the terms and conditions set forth below, WDNR and WCL agree as follows:

## **I. PARTIES BOUND**

A. The WDNR and WCL have each consented to the following Contract, entered into pursuant to ss. 292.11(7), 292.31(3)(b) and 292.51, Wis. Stats., to provide for the remediation of the arsenic contamination at the Site.

B. This Contract shall apply to and be binding upon the undersigned parties and their respective agents, successors and assigns. The undersigned representative of each party certifies that he or she is fully authorized by the party whom he or she represents to enter into this Contract and to execute and legally bind such party to the terms of this Contract.

C. Nothing in this Contract shall be construed as an admission of fact or liability by the WCL for any matters other than the contractual obligation between the parties and as further described in this Contract. WDNR and WCL agree to undertake all actions required by the terms and conditions of this Contract and consent to and will not contest or legally challenge the validity of this Contract, or the authority of the other party to enter into this Contract.

## **II. STATEMENT OF PURPOSE**

In consideration of each of the promises, covenants and undertakings of the WDNR and WCL under this Contract, WDNR and WCL hereby agree that WDNR and WCL shall perform the following tasks:

A. WCL agrees to pay the WDNR, the tax identification number for which is 39-6006436, within sixty (60) days of execution of the Settlement Documentation, Nine Hundred Five Thousand Five Hundred and No/100ths Dollars (\$905,500.00), as a contribution toward the costs the WDNR



will incur to complete the remediation activities selected from the Treatability Report identified in section IID that are intended to remediate the arsenic contamination.

B. For and in consideration of the payment of the sum total of \$905,500.00 in the manner specified below, the receipt and sufficiency of which is hereby acknowledged, the undersigned WDNR, hereby agrees to fully and forever waive, release, acquit and discharge WCL, its parent corporation(s) and subsidiaries and its respective shareholders, directors, officers, employees, successors, agents and assigns, or any other person acting on behalf of WCL from and against any and all claims, demands, judgments, settlements, damages, actions, causes of action, rights, injuries, administrative orders, consent agreements and orders, liabilities, penalties, costs and expenses or compensation whatsoever, direct or indirect, foreseen or unforeseen, that the WDNR now has or may have or that may arise in the future under any law, including , but not limited to, ss. 292.11 or 292.31, Wis. Stats.:

(1) due to personal injury, death or property damage arising out of WDNR's presence on, or use of, the former Luxemburg-Kewaunee Line right-of-way for, and activities in, conducting the work described in the said Environmental Repair Contract, and

(2) arising from or relating directly or indirectly to (i) the presence of arsenic from, on, under, or affecting the Site, (ii) the migration of arsenic onto the Site from any contiguous property or onto any other property from the Site, (iii) the disposal, release, discharge, emission, spillage, or dumping of arsenic on the Site by any person, known or unknown. For purposes of this section II.B.(2), "arsenic" means the element arsenic, in any of its forms, and any compounds or minerals containing arsenic. WCL's liability, if any, for hazardous substances other than arsenic shall be limited to those response actions and costs that would have been required in the absence of arsenic.

C. The WDNR agrees to hire a contractor to complete the remedial activities presented in the Treatability Report identified in section IID that are intended to remediate the arsenic contamination.

D. WCL hereby agrees that it will send one check payable to the WDNR in the amount identified in sec. IIA and as detailed below. These moneys are intended to assure the implementation of the remedial activities to be taken at the Site by the WDNR and to reimburse the Wisconsin Environmental Fund for the costs of conducting the treatability study.

E. The moneys provided by WCL will assist with hiring consultants and contractors to complete the remedial activities identified in the Treatability Report or other activities determined to be effective. The monies will pay the following items:

1. \$762,500.00 for conducting the remedial activities identified in the Treatability Report and associated permits and fees.
2. \$83,000.00 for reimbursement of Environmental Fund portion of costs for the treatability study.
3. \$60,000.00 for reimbursement for staff time to assist in overseeing project activities in the form of a Limited Term Employee project position.

F. WDNR intends to take the following steps necessary to address the arsenic contamination and remediate the Site:

1. Source area – Eliminate the on-going source of dissolved-phase arsenic by either pumping the contaminated groundwater and disposing it off-site as a hazardous waste, or treating the groundwater *in situ*.
2. Slough water – Eliminate the source of arsenic to the Kewaunee River by constructing an impermeable barrier along the fence line at the site. The impermeable barrier would eliminate the migration of arsenic from the marsh to the river and allow time to address remediation of the marsh soil.
3. Marsh soil – Reduce the concentration of arsenic in the marsh soil to meet the clean-up criteria using bio-reduction. Field trials will be conducted before full-scale implementation of the approach in order to confirm the effectiveness of this option, and to determine the most cost-effective approach for bio-reduction at a full-scale level.

G. The WDNR specifically reserves the right to modify the remedies provided herein in the event future circumstances support such a modification.

### **III. WORK TO BE PERFORMED**

A. The WDNR agrees it shall hire the necessary contractors, consultants, to conduct the activities under this Contract as identified above.

B. The WDNR agrees it shall be responsible for ensuring that all contractors, consultants, firms, officers, employees and other persons or entities acting under or for the WDNR with respect to matters included herein comply with the terms of this Contract, and with all applicable statutes and rules.

### **IV. ACCESS**

WCL acknowledges that WDNR and its employees, contractors and authorized representatives have the legal right to access the entire Site at all times as necessary.

### **V. EFFECTIVE DATE**

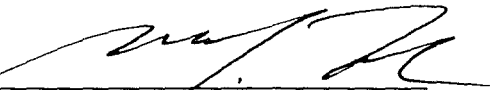
This Contract shall be executed by WCL, before being executed by the WDNR. When the WDNR executes this Contract, the WDNR shall enter an effective date immediately below the WDNR's signature which shall be the date of mailing (first class postage prepaid) by the WDNR to WCL of a fully executed copy of the Contract.

### **VI. TERMINATION AND SATISFACTION**

Upon payment as set forth above, WCL shall have fully performed its obligation under this Environmental Fund Contract.

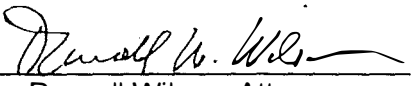
The parties, whose signatures appear below, or on separate signature pages, hereby agree to the terms of this Contract. Each person signing this Contract asserts and warrants that he or she has been duly authorized by the WDNR or WCL, as the case may be, to execute and legally bind the respective parties to the terms of this Contract.

**WISCONSIN DEPARTMENT OF NATURAL RESOURCES**

By:   
Matthew J. Frank, Secretary

Date: Feb 6, 2008

**WISCONSIN CENTRAL LTD.**

By:   
Russell Wilson, Attorney

Date: 1/14/08

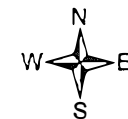


Exhibit A



Legend

- County Road Centerlines
- State Road Centerlines
- Townships
- USPLSS Sections
- Pavement (2000)
- Railroad Right-of-way Lines
- Road/Railroad Right-of-way
- Railroad Centerline
- CSM Lines
- Condo Lines
- Subdivision Lines
- Plat of Survey Lines
- Government Lot Lines
- Parcels
- Buildings 2005
- Meander Lines
- Easement Lines
- subdivision\_o
- Right-of-Way
- Villages and Cities



1 Inch equals 2,500 Feet

1/4/2008

Disclaimer: Kewaunee County Land Information Systems makes every effort to produce the most current and accurate information possible. No warranties, expressed or implied, are provided for the data provided, its use, or its interpretation. Kewaunee County does not guarantee the accuracy of the material contained herein and is not responsible for any misuse or misrepresentation of this information or its derivatives. Kewaunee County parcel maps are for tax and real property listing purposes only and do NOT represent a survey. The tax parcel maps are compiled from official records, including survey plats and deeds, but only contain the information required for Kewaunee County business. You should always use the original recorded documents for legal or survey information.

Contact:  
 Steve Hanson  
 Land Information Director  
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 Kewaunee, WI 54216  
 Phone: (920) 388-7047  
 Email: hansonst@kewauneecc.org