Commandant United States Coast Guard

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May 3, 2022

Mark Zimmerman, President Friends of the Rail Bridge 1015 East Bowen Avenue Bismarck, North Dakota 58504

Mike L. Herzog, Director Bridge Maintenance BNSF Railway Company 4515 Kansas Avenue Kansas City, KS 66215

Dear Mr. Zimmerman and Mr. Herzog:

In early 2022, the Coast Guard learned that Friends of the Rail Bridge (FORB) was developing an argument that BNSF was not the actual owner of the rail bridge across the Missouri River at Bismarck, North Dakota. According to this legal theory, North Dakota's statehood in 1889 transferred ownership of the lands beneath navigable waters to newly admitted States under the Equal Footing and Public Trust Doctrines. As the bridge, which predated North Dakota's admission to the Union, was partially built upon those submerged lands, it too transferred to the State according to FORB.

On February 8, 2022, FORB submitted a memorandum to the Coast Guard setting the factual and legal basis for its claim that the State of North Dakota is the owner of the bridge, and therefore is the proper party to apply for a permit to replace the existing bridge with a new structure. FORB provided a supplemental memorandum to the Coast Guard on February 18, 2022.

On March 11, 2022, BNSF provided the Coast Guard a responsive memorandum disputing FORBs claim that the State of North Dakota owns the rail bridge at Bismarck. BNSF cites to the Congressional Act of 1864 that authorized the construction of the rail line at issue, which includes the bridge, and to specific provisions of North Dakota law to support its position that as a successor to the Northern Pacific Railroad, it has the obligation to maintain the bridge and right to replace it.

Although the Coast Guard possesses the requisite expertise to evaluate the navigational and environmental impacts of a proposed bridge project, it is not qualified to serve as an arbiter of property ownership disputes. Following Coast Guard practice where State land ownership or authority may be at issue in a bridge permit application, the Coast Guard contacted the State of North Dakota's Office of the Attorney General on March 25, 2022, seeking an opinion on this issue. The Coast Guard provided all materials submitted by FORB and BNSF to the Attorney General for consideration.

On April 28, 2022, a representative of the Attorney General's Office contacted the Coast Guard. After having reviewed the submittals by FORB and BNSF and researched the matter, the Attorney General elected to not provide an opinion regarding potential State ownership of the bridge. Instead, the Attorney General forwarded to the Coast Guard a copy of the enclosed letter, which he wrote to State Senator Potter addressing the same bridge ownership question.

It is undisputed that BNSF has sufficient ownership rights necessary to operate and maintain the existing bridge as it has done, and its predecessors have done, since the bridge was constructed in 1883. Given that the State has considered the positions advanced by FORB and BNSF, and elected not to assert an ownership interest in the rail bridge or otherwise take a position on this dispute, the Coast Guard has determined that BNSF is the proper party to submit an application for a replacement bridge. As such, the Coast Guard will continue to process the application package submitted by BNSF.

Sincerely,

Shelly Sugarman Chief, Bridge Permits and Policy Office of Bridge Programs U.S. Coast Guard By direction of the Commandant

Enclosure

cc:

Eric Washburn District Bridge Manager US Coast Guard – D8 dwb

Rob McCaskey Bridge Management Specialist US Coast Guard – D8 dwb

William Peterson State Historic Preservation Officer State Historical Society of North Dakota

Christopher Koeppel Assistant Director Advisory Council on Historic Preservation

Christopher Wilson Program Analyst Advisory Council on Historic Preservation