



**FORB – Friends of the Rail Bridge**

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Established 2018 | Burleigh & Morton County | (701) 220-4513  
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May 4, 2022

Brian L. Dunn  
Chief, Office of Bridge Programs  
Commandant (CG-BRG)  
U.S. Coast Guard STOP 7509  
2703 Martin Luther King Jr. Ave. SE  
Washington, DC 20593-7509

Mr. Rob McCaskey  
U.S. Coast Guard-dwb  
1222 Spruce Street  
Suite 2.102D  
St. Louis MO 63103-2832

Sent by email with enclosures to: [Brian.Dunn@uscg.mil](mailto:Brian.Dunn@uscg.mil); [Rob.E.McCaskey@uscg.mil](mailto:Rob.E.McCaskey@uscg.mil)

Dear Mr. Dunn and Mr. McCaskey:

Friends of the Rail Bridge (FORB) has received the letter dated May 3, 2022 from Shelly Sugarman stating “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.”

As such, we draft this letter to draw your attention to the following issues:

- The United States Coast Guard (USCG) does not have the statutory authority to determine rights of legal ownership.
- A Railroad right-of-way is not ownership of the bridge itself or of the riverbed.
- By proceeding with the permitting process, the USCG is breaking its commitment to FORB to not issue a permit until the issue of ownership was resolved.
- The letter from USCG on May 3, 2022, does not address points FORB made in its 58 page memorandum dated April 4, 2022, and sent to the USCG, the North Dakota Governor’s office, and the North Dakota Attorney General’s office that was written in response to

BNSF's claim of ownership. Previous Attorneys General have issued opinions on ownership of the riverbed in cases that were contested and were resolved in court. Failure to address this issue is not justified legally and fails to protect the important state ownership of the Missouri Riverbed in related cases, such as mineral ownership currently being litigated by the Mandan, Hidatsa, and Arikara Nation.

- BNSF's memo failed to address issues raised by FORB regarding the Equal Footing and Public Trust Doctrines.
- By failing to address the issues, BNSF's memo is largely irrelevant to the issue of the ownership interest transferred to the State of North Dakota at statehood.
- As discussed in FORB's April 4, 2022, memorandum, the 1864 Act that created the Northern Pacific Railroad did not contain language giving ownership to the underlying property beneath the right-of-way to the Northern Pacific Railroad; in fact, it is language that only gave them a right-of-way interest and authority to operate a railroad.
- The state has never relinquished its right to the riverbed. Ownership of the riverbed triggers *North Dakota Century Code* 55-02-07, wherein "any historical or archaeological artifact or site that is found or located upon any land owned by the state or its political subdivisions or otherwise comes into its custody or possession and which is, in the opinion of the director of the state historical society, significant in understanding and interpreting the history and prehistory of the state, may not be destroyed, defaced, altered, removed, or otherwise disposed of in any manner without the approval of the state historical board..." Ensuring satisfaction of this law is a non-discretionary duty of the Director of the State Historical Society of North Dakota.
- The USCG has allowed BNSF to exert undue influence in the National Historic Preservation Act (NHPA) Section 106 process in the drafting of a Programmatic Agreement. In addition, BNSF has asserted to USCG, North Dakota state and local officials, and FORB that those public and private entities would have to pay for BNSF's costs to "avoid, minimize, and mitigate" the impacts of the proposed project on the Historic Bridge under NHPA and its implementing regulations, if they wanted to save the Historic Bridge. There is no such requirement under the NHPA or any other federal or state law. On the contrary, costs of avoidance, minimization, and mitigation are the responsibility of the project proponent. BNSF has asserted at various points in these proceedings that these avoidance costs are between \$50 and \$90 million dollars. By falsely claiming that these costs are the responsibility of state and local officials, BNSF actions constitute undue influence under the NHPA.

FORB is disappointed that North Dakota Attorney General Drew Wrigley, has thus far declined to issue an Attorney General's opinion regarding ownership of the Missouri Riverbed and the Bismarck-Mandan Rail Bridge, despite requests from the USCG, North Dakota State Historic Preservation Officer/Director of the State Historical Society of North Dakota, and North Dakota

State Senator Tracy Potter. It is evident that the State has a direct interest in resolving the ownership issue.

Just this week, as widely reported regarding another case about the Missouri River riverbed, Attorney General Drew Wrigley's office has stated, "The State has never relinquished its claim to the historical riverbed, which it acquired at statehood in 1889 under the equal footing doctrine, which provides that a state entering the Union retains title to the beds of navigable rivers and lakes within the state, unless Congress has expressly designated otherwise." This concurs with FORB's contention in its April 4 memo that the 1864 Congressional Land Grant creating the Northern Pacific Railroad did not have language transferring ownership of the real estate of the railbed, but rather a right-of-way interest granting authority to operate a railroad.

As such FORB requests that the USCG maintain its previous commitment to not issue the final environmental impact statement, record of decision, or permit until after the ownership issue is resolved.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Zimmerman". The signature is written in a cursive style with a large, looping initial "M".

Mark Zimmerman

President of FORB