
Subject	Section 106 PA Invited Signatories Meeting
Project	BNSF Bismarck Bridge Replacement Project
Prepared by	Lori Price and Aimee Angel
Location	MS Teams Video Conference Call
Date/Time	March 9, 2022, 4:30 p.m. CT

Participants	Organization
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Abby Korte	Jacobs
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Aimee Angel	Jacobs
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Amy McBeth	BNSF
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Bill Peterson	ND SHPO
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Chris Wilson	ACHP
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Christopher Koeppel	ACHP
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Lori Price	Jacobs
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Lyle Witham	FORB
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Mark Zimmerman	FORB
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Brian Dunn	USCG
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Matt Robertson	USCG
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Mike Herzog	BNSF
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Rob McCaskey	USCG
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Shelly Sugarman	USCG
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Signe Snortland	FORB
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Tim Pavilonis	USCG
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Rob McCaskey opened the meeting and reviewed the agenda.

Brian Dunn introduced Tim Pavilonis, legal advisor to the Maritime Transportation Systems Directorate for the USCG. He then stated the purpose of the meeting was to respond to FORB's request on February 22, 2022 for termination of the Programmatic Agreement. He then asked Chris Wilson, from ACHP, to explain the process for termination of the PA and potential outcomes of termination.

Chris Wilson discussed termination of agreements. Stated that there is always an attempt to resolve issues prior to termination. This meeting today is to ascertain why FORB wants to terminate, to answer questions, and to resolve any issues.

Brian Dunn asked Chris Wilson to go into more details regarding termination of the PA versus termination of consultation since they are not the same thing.

Chris Wilson explained that there are different players in the process. For example, SHPO may decide to terminate consultation in which case they remove themselves from the process; consultation between the agency and the ACHP continues and hopefully a document is created. Termination of the PA is the nuclear option. He explained that the PA would be removed, and that he would discuss this more later in the meeting.

Brian Dunn presented the issues that FORB raised in their February 22, 2022 letter requesting termination. There are four issues:

1. Ownership of the bridge
2. Undue financial burden and unreasonable timelines for FORB to act
3. Limited mitigation presented by BNSF
4. State ownership of the bridge negates the need for a public partner.

Brian Dunn explained that the group would discuss each of these points separately. Brian would first provide a summary of the issue and then ask each signatory for additional comments. Once the signatories have provided their input, the topic will be open to discuss a resolution.

Issue #1 – Ownership of the bridge

FORB states the PA is fundamentally flawed given the apparent state ownership of the property. North Dakota Century code 55-02-27 protects significant properties on state land, which cannot be destroyed without approval from the State Historical Board.

Mark Zimmerman yielded his time to Signe Snortland.

Signe Snortland thanked the USCG for setting a tone of compromise and stated that BNSF has not produced any documentation to prove ownership of the bridge. She continued that the PA assumes that

BNSF owns the bridge and that, if BNSF does not own the bridge, then demolition of the bridge should not be under consideration without the approval of the State Historical Board.

Mike Herzog replied that BNSF has performed extensive research on the topic is preparing a response is confident they own the bridge, and that FORB's assertion has no merit. He added that BNSF has not reached out to the North Dakota Attorney General.

Bill Peterson stated that the SHPO has reached out to the Attorney General. The AG's office response stated, "Currently the rail bridge ownership issue, over the Missouri River, is one between the United States Coast Guard, BNSF, and FORB. The State Historical Society does not have involvement in the bridge until such a determination is made. However, due to the fact that no state agency or other state entity is involved in the ownership dispute, an Attorney General opinion is not warranted or appropriate. The State Historical Society and Attorney General's office are aware of the situation and are monitoring as it develops. Once ownership question is resolved, the State Historical Society will take appropriate action based on the outcome of the discussion between BNSF, FORB, and the United States Coast Guard."

Brian Dunn replied that the USCG does not determine ownership. The issuance of a USCG bridge permit requires that the "right to build" be determined. The Coast Guard has asked BNSF to provide ownership documentation that can be provided to the State of North Dakota.

Mark Zimmerman asked Mike Herzog if BNSF had been in contact with the Attorney General's office.

Mike Herzog replied that to his knowledge, BNSF has not been in contact with the Attorney General's office.

Lyle Witham reviewed FORB's argument that BNSF does not own the bridge.

Brian Dunn restated that the USCG does not determine ownership. At this time, we can make a note to amend the PA to say that a final ownership determination will be made, but it is uncertain whether that would materially affect the PA.

Chris Wilson stated that this is a unique and unusual set of circumstances and that it would be, in his opinion, ill-advised to terminate the PA. If ownership does change, ACHP would like to see what the state [of North Dakota] would do. If ownership does not change, the PA would remain largely the same. He continued asking parties to understand that, if the agreement is terminated, it would remove FORB from the discussions since they are not invited signatories on the MOA.

Signe Snortland stated that FORB spent a lot of time looking for a public partner. Every time FORB began talking to a potential partner, BNSF was there to scare them away. This issue makes a huge difference to FORB.

Brian Dunn voiced concern that attendees were jumping ahead to something that is undetermined. He cautioned that, if the PA is terminated, especially based on something that is questionable, then it is no longer there as a document to fall back on. If it is determined that the state owns the bridge then there is a fundamental shift in the project that needs to be dealt with. It is questionable whether amending the PA will resolve the issue.

Signe Snortland stated that the 60-day clock started on February 22. When 60 days are up, the agreement is terminated. Is that not correct, Chris?

Chris Wilson stated that it is 45 days, but we are trying to resolve to avoid termination. Termination does not serve FORB's interest. It is better to wait and see what happens with ownership. If the PA is not terminated, it can be amended, and consultation can continue. If FORB wants to continue with termination, that kicks the can to the ACHP, and we send our advisory opinion to the USCG. And the PA is removed. This removes leverage. FORB is no longer a participant because the PA does not exist if you wait to see what happens with ownership, then the PA may be amended.

Signe Snortland stated there is termination of the PA and there is termination of Section 106. We would still be involved in the conversation for the MOA.

Lyle Witham stated that it would be worth discussing if we can have a court decide on this issue.

Brian Dunn replied that BNSF and the State need to look at the ownership issue

Lyle Witham said opinions of the Attorney General are binding on state agency officials that request them. They are advisory to courts or other parties that request them. The Attorney General is only required to write an opinion at the request of legislators or state agency heads. The AG's opinion is only advisory.

Brian Dunn asked FORB if they would wait until we get a legal opinion on ownership of the bridge before using this point as a reason for terminating the PA?

Lyle Witham and Mark Zimmerman confirmed it would need to go to their Board for consideration, which is scheduled for next week

Chris Koeppel stated that ACHP is pleased that parties are still willing to compromise and give time to consider ownership of the bridge. In terms of timeline, the signatories to the PA can circulate a letter with an amendment for quick signature that would permit additional time while this issue is being worked out.

Brian Dunn asked if there is general agreement that we can wait until we have more information on the ownership issue to resolve any impacts to the PA?

Signe Snortland interjected that the USCG has already decided that there will be no preservation of this bridge.

Brian Dunn replied that no, the USCG made a decision to move to Stipulation VI in the PA which moves to the development of the MOA. We have not made any decisions regarding the alternatives in the EIS. The process established in the PA – that if the requirements of Stipulation V. were not met, we would move on to Stipulation VI. - does not constitute a decision by the USCG that the bridge would be removed.

Signe Snortland asked if preservation of the bridge is still an option?

Brian Dunn affirmed that there are still alternatives in the EIS that leave the existing bridge in place. We have not made a determination on that yet.

Brian Dunn moved to Point #2 - The PA places unprecedented and undue financial burden on a public/private partnership to raise funds to pay BNSF's added design costs and construction premiums above those of BNSF's proposed action as well as the cost to design, implement mitigation measures, complete an expensive no-net rise analysis, and obtain permits within an unreasonable timeframe to preserve this historic property. All deadlines assigned to FORB and the public/private partnership in the PA are unreasonable.

Mark Zimmerman yielded to Signe Snortland who stated that this is shifting the cost from the permit applicant to the preservation proponent. It would cost FORB up to \$100 million to preserve this bridge. FORB would be more enthusiastic about this PA if we could find a compromise on this.

Mike Herzog stated that BNSF has gone to great lengths to answer questions about this project. The reality for any concept that retains the existing bridge is that cost, schedule, and risk increase dramatically. The environmental impacts increase, too. These are actual costs that someone needs to pay.

Brian Dunn asked if Dr. Peterson had any comments.

Bill Peterson had no comments.

Chris Wilson opined that if bridge ownership changes, then that changes the way we look at this PA. It is another reason why termination is not the answer. ACHP asked whether FORB would consider withdrawing the request for termination.

Lyle Witham stated that it is a crazy idea to shift the financial burden of avoidance to the preservation proponent.

Amy McBeth replied that BNSF spent several consulting parties' meetings walking through the costs and engineering to provide what we know and why.

Mike Herzog included that Section 106 does not require avoidance and what we are going after is the most practical and reasonable solution. Increasing the project footprint, costs, and schedule is not reasonable.

Lyle Witham replied that the cost of avoidance and mitigation is being shifted away from the railroad. Due diligence has not been done on the alternatives.

Mike Herzog replied that the level of effort evaluating the concepts has been great. To say BNSF has not done their due diligence in evaluating these concepts is incorrect and uninformed.

Signe Snortland stated there isn't any compromise being offered here. The shift of avoidance and mitigation from the project applicant to the preservation proponent is not acceptable. That's been our problem from the beginning. FORB signed the PA under protest. If there is no compromise to discuss here, she suggested to move on.

Brian Dunn advised that the two big issues with retaining the existing bridge have been the flood plain rise (which we have not been able to overcome) and the economics of the additional costs. The PA addressed these issues and gave an opportunity to FORB to develop an alternative that would alleviate the flood plain rise and be economically feasible. Based on the additional costs and the fact that flood plain rise has not been alleviated, which limits the alternatives, what about the PA should be changed to look at the related cost burdens associated with an alternative that would retain the bridge outside the alternatives already in the EIS?

Signe Snortland declared that FORB has no objections to the alternatives in the EIS. FORB hired an independent engineering firm to analyze the CLOMR prepared by BNSF. They found problems with the modeling. The coefficients were manipulated. They also found a mitigation for the preservation alternative in the EIS. It was a \$10 million fix that improved the flow under the existing highway bridge by installing two culverts.

Brian Dunn stated that the USCG looked at the information provided by Ackerman and submitted additional questions. The USCG did not receive responses to those questions, including cost estimates.

Signe Snortland stated that cost estimates were included in the technical memorandum that was provided.

Brian Dunn stated that the USCG will review the technical memorandum again. There was also discussion about the modeling that was used that was approved by the flood plain administrator. One of the conditions in the PA was submission of a CLOMR application to evaluate the flood plain rise data provided

by Ackerman; that did not happen. The USCG requested additional information about the cost and concurrence from North Dakota DOT about whether culverts were feasible.

Signe Snortland stated that Ackerman had that conversation with NDDOT and they said that culverts were feasible and they were not opposed to them.

Brian Dunn stated that he did not recall the Coast Guard receiving any additional information from FORB or NDDOT concerning the culverts. USCG will go back and look at the technical memorandum again. Based on this, what is FORB looking for in terms of amending the PA?

Signe Snortland and Lyle Witham opined that the cost of developing a new CLOMR is thousands of dollars, which the applicant should be providing, not FORB.

Mike Herzog stated that Step 1 was to conduct the hydraulic modeling for a concept to show it will work and not result in a net rise on the river. BNSF has done this.

Lyle Witham stated that Chevron deference only applies when an agency acts in a reasonable way. Refusing a model because it is not the one that is always used would not hold up in court.

Brian Dunn stated that BNSF has an approved CLOMR and asked if the CLOMR is just for the preferred alternative?

Mike Herzog stated that BNSF has an approved CLOMR for the preferred alternative. For two of the other three alternatives, BNSF has done the hydraulic modeling using the same model and parameters that were accepted by the FEMA administrator.

Brian Dunn stated that, again, the Coast Guard will go back and look at the technical memorandum.

Amy McBeth asked that if the ownership issue is something and FORB is waiting on amendments that would be related to that, that is one thing. BNSF is trying to understand the amendments to things that have been agreed to and what has changed from when the agreement was put in place to now. What has changed with any new information?

Signe Snortland stated that the information has not changed, and that FORB has raised this objection since the very beginning. FORB sent a letter to the USCG saying they were signing the PA under duress.

Chris Wilson stated that this echoes previous discussions. The ownership is a critical issue that no one questioned in the past. I would like to ask FORB to withdraw their termination request. Once ownership is

resolved, then we can move forward. This truly is an impasse. Once ownership is resolved, then we continue on with consultation to get an amendment.

Signe Snortland asked what resolution would look like? Is BNSF stating that they own the bridge enough or is it going to court to get a ruling?

Chris Wilson stated that he will need to go back and ask the ACHP attorneys. The USCG has to make a judgement as to who owns the bridge.

Signe Snortland asked how will the USCG make a determination on ownership?

Brian Dunn stated that in the past, we have asked the state attorney general for their opinion, and we have used that opinion to determine an applicant's right to build.

Tim Pavilonis stated that the USCG has had disputes in the past that needed to be resolved before we move forward on a permit. Our regulations do provide a mechanism to ask a state attorney general for an opinion when a state is involved. Until recently, the state has not been involved. Now there is an assertion from FORB that the state owns the property. I have seen nothing from the state stating that they own the property. I suspect that we will be writing to the attorney general to see if they have any assertion that they own the property. The Coast Guard will likely accept their opinion as determinative unless another party wants to take this to court but the USCG is not going to take it to court.

Signe Snortland asked if the USCG will hold off on the permit application and the final EIS decision until this is resolved?

Brian Dunn replied that the USCG cannot issue a permit or a record of decision until the right to build is resolved.

Lyle Witham stated that the Attorney General's decision is advisory only. We could just agree that a Federal declaratory judgement action would be the easiest way to resolve this. I think it would make a lot of sense to withdraw FORB's termination request as long as we all agree to use the declaratory judgement act as a way to resolve the ownership dispute. We have to go to the Board with this. FORB is concerned about commitments that may or may not be made by the State to get involved. Has BNSF gone to the State and asked the State to stay out of the matter? We may have to make a public records request.

Brian Dunn stated that the USCG is not aware of anything like that.

Mike Herzog stated that the opposite has occurred. It has been nothing but collaborative.

Lyle Witham asked what commitments were made?

Amy McBeth stated that BNSF has had conversations with lots of people over the course of the years just like FORB has and it's a part of what BNSF would normally do for a project like this.

Brian Dunn stated that it sounds like, rather than moving forward with termination, we may want to wait until the ownership issue is resolved. Do we want to move forward with the remaining points? Or hold those for a later time.

Signe Snortland stated that if any compromises could be offered now, that would be helpful. I would say let's continue.

Brian Dunn moved on to the next point - FORB contends that the mitigation measures currently under discussion in the MOA appear to be limited and dictated by BNSF rather than the USCG. The mitigation measures specifically were not dictated by BNSF. The current MOA structure was proposed by the Coast Guard after multiple discussions with over 21 projects proposed. We sought to get additional information on cost and responsible parties for those projects. We only received that information for 5 or 6 of the projects. The Coast Guard recommended, and the consulting parties agreed, to establish a grant program so that projects could be submitted later. The consulting parties also agreed to add a salvage section to the MOA.

Signe Snortland suggested that we pause this discussion until the ownership issue is resolved because the MOA could also change drastically with state ownership.

Mike Herzog stated that BNSF would object to stopping progress on the MOA. There is a clear path forward to continue the dialogue we started to finalize how we would mitigate the loss of the bridge when we show that it is owned by BNSF. I see no reason not to continue progress when you consider the 5 years that we have been working toward this.

Bill Peterson concurred that it would make sense to continue talking about the MOA, but not sign it until we get the ownership issue settled.

Chris Wilson stated he would recommend to ACHP leadership that we continue with the MOA but not sign it until the issue of ownership is resolved.

Signe Snortland stated that FORB would take this to the Board as well, and then provide a follow up.

Brian Dunn stated that the last issue also has to do with the issue of ownership. There is no longer a need to look for a public partner if the state owns the bridge. This is still dependent on the determination of ownership.

Signe Snortland stated that FORB concurs and is ready to wrap up this call.

Mike Herzog stated that there has been plenty of time for FORB to find a partner.

Brian Dunn stated that the issue is that, if the State owns the bridge, there is no reason to look for a public partner.

Mike Herzog stated that BNSF has no additional comments.

Chris Wilson asked FORB to withdraw the termination request. That can be a simple email sent to all the signatories.

Mark Zimmerman stated that the FORB Board is scheduled to meet Tuesday night and they will have a letter out on Wednesday.

Brian Dunn stated that we (the signatories) agree that once the ownership issue is resolved, then we can determine what amendments may be needed to the PA. Does anyone object to this as the way forward?

Lyle Witham stated that FORB agrees with that. Finding a public partnership, the dollar amounts were developed based on reimbursing BNSF for that issue of avoidance, minimization, and mitigation that they shifted. There is no legal authority for that. The cost of making the bridge suitable is way different than the cost of reimbursing BNSF for that and making that the amount of money has no legal basis.

Brian Dunn reiterated that the group discussed that earlier in the meeting and how that may be impacted by the ownership issue.

Brian sought any last comments and receiving none, concluded the meeting.

Meeting ended at 6:30 pm