



FORB – Friends of the Rail Bridge

Established 2018 | Burleigh & Morton County | (701) 220-4513
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February 18, 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; Rob.E.McCaskey@uscg.mil

Re: Follow-up Information and Request Regarding Response to Bismarck Rail Bridge Dispute Resolution January 28, 2022, Meeting Minutes

Dear Mr. Dunn and Mr. McCaskey:

This is a follow-up response to the letter and memorandum Friends of the Rail Bridge (FORB) sent you on February 8, 2022. In the February 8th Memorandum, FORB referenced numerous historical photographs of the 1883 Northern Pacific Railroad Bridge between Bismarck and Mandan that contain relevant evidence pertaining to the ordinary high-water mark of the Missouri River at the bridge location when North Dakota was admitted to the Union on November 2, 1889. Some photographs are included in North Dakota State Geologist Edward Murphy's 1995 article on the history of "The Northern Pacific Railway Bridge at Bismarck," which was included as an enclosure with the February 8th Memorandum. Below are two additional historical photographs relevant to this issue.

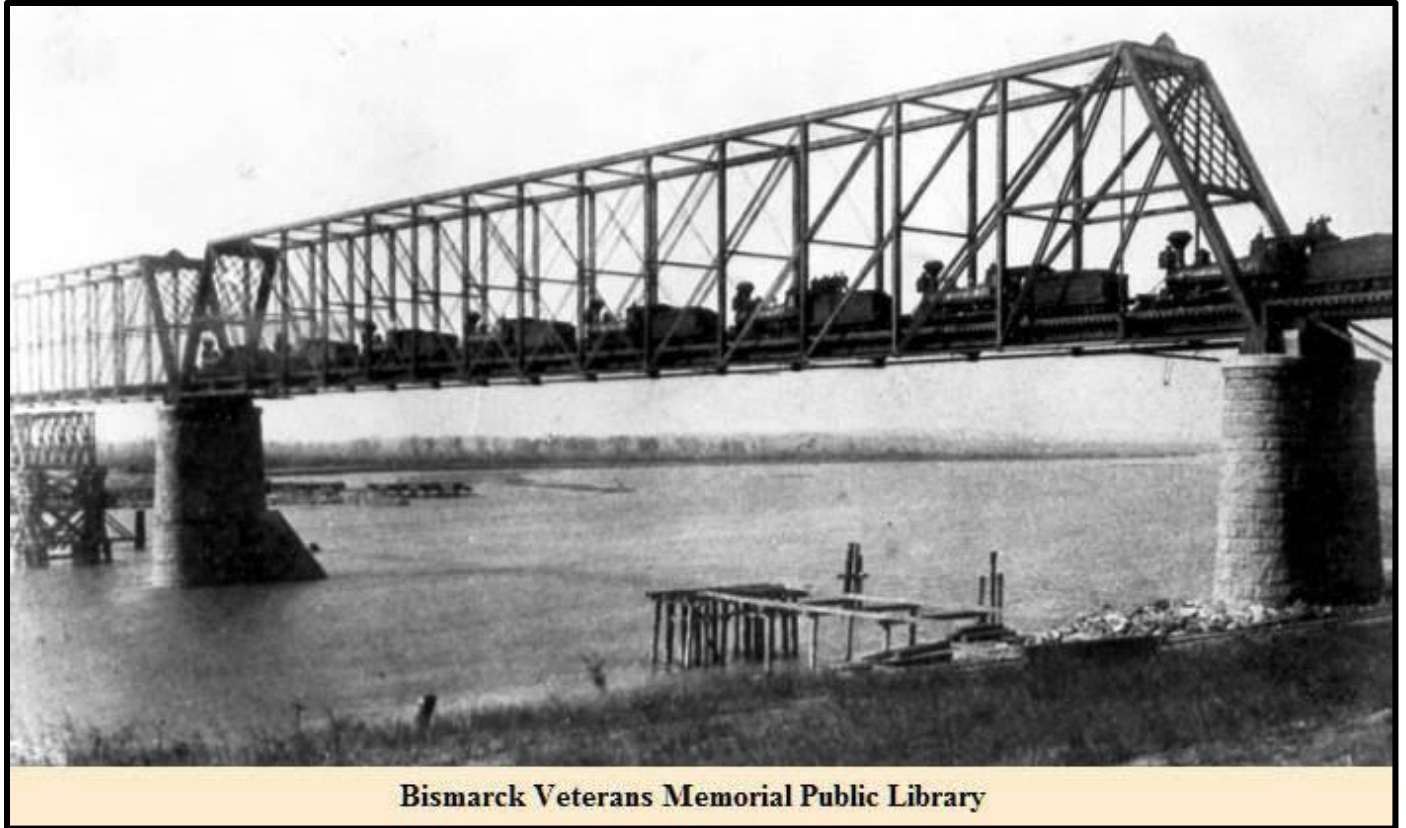
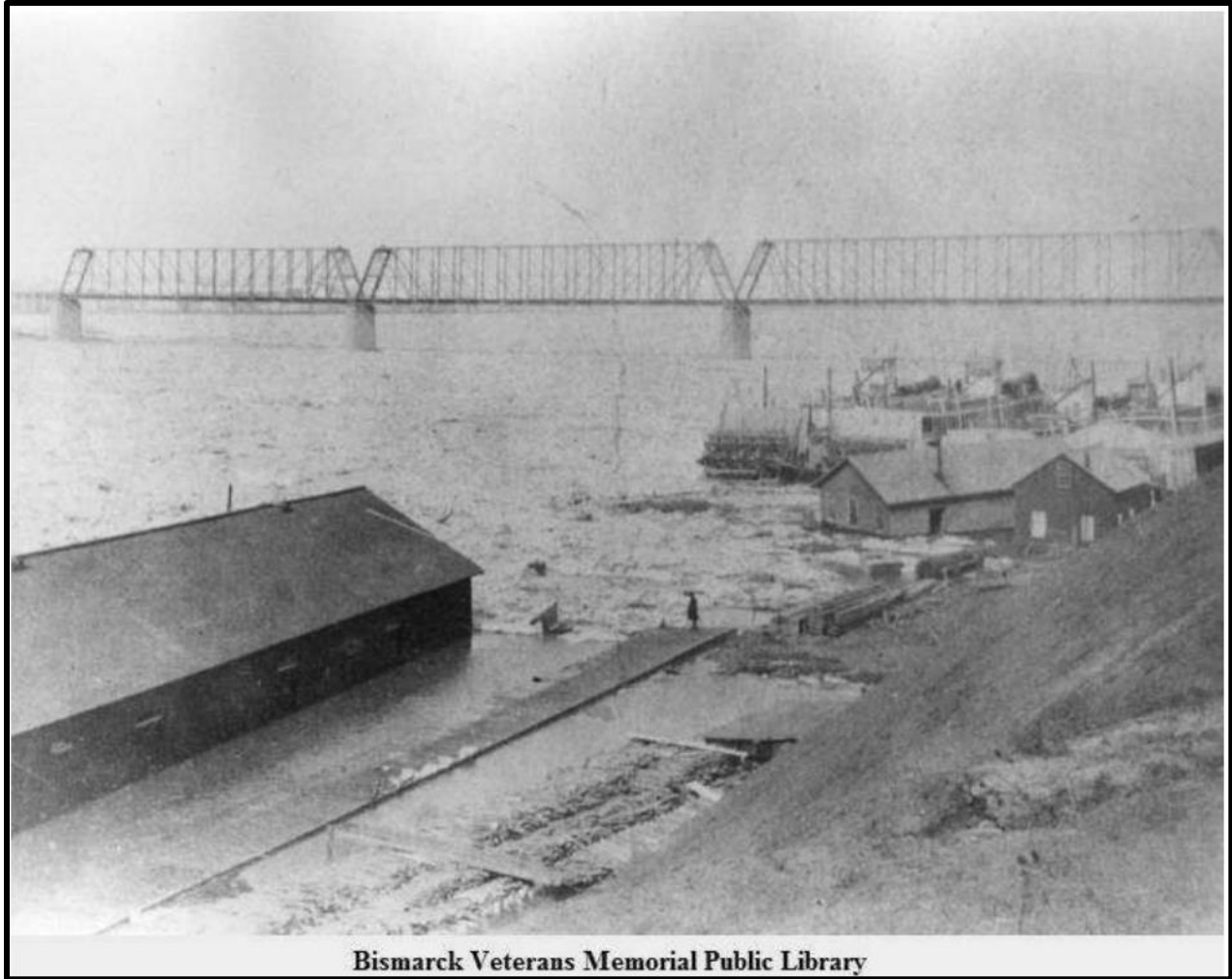


Photo of the *weight test of the Northern Pacific Railroad Bridge* at Bismarck, taken looking northwest on October 21, 1882 (photo courtesy of the Bismarck Public Library).

This photograph was taken on October 21, 1882, on the day the bridge was tested to see if it could safely bear the weight of eight steam engines, as discussed in Ed Murphy's 1995 article. It shows the eastern bridge pier within the ordinary high-water mark of the Missouri River.

Like the 1884 photograph of Missouri River spring flooding levels in Ed Murphy's 1995 article, the next one taken in 1887 of Missouri River shows flood levels high enough to cover the base of all four piers at the spring high-water mark that year. Again, as discussed in FORB's February 8th memorandum and enclosures, the relevant factual issue is the ordinary high-water mark defining the bed of the Missouri River at the time North Dakota became a state. These two photographs taken within 5 years before statehood document that the Missouri River's ordinary high-water mark at that time (November 2, 1889) is above the base of all four piers.



Bismarck Veterans Memorial Public Library

Photo of Missouri River flooding at Steamboat Landing and the Northern Pacific Railroad Bridge at Bismarck, taken looking northwest in 1887 (photo courtesy of the Bismarck Public Library).

Also attached for your convenience is Darwin Roberts' 2011 law review article discussing the property interest transferred to railroads under various Acts of Congress in the 19th Century. Darwin notes:

The evidence actually indicates that throughout the nineteenth century, beginning in the 1830s, Congress followed consistent policies with respect to its railroad rights-of-way. Despite characterizing them as “easements” or similar to easements, it viewed them as property over which the United States retained continued ownership and control. Moreover, because Congress viewed railroad right-of-way grants as separate from its railroad land subsidy grants, Congress did not intend to change rights-of-way in 1871 when it ceased granting land subsidies¹.

¹ Darwin P. Roberts, “The Legal History of Federally Granted Railroad Rights-of-Way and The Myth of Congress’s “1871 Shift,” 82 Colo. Law Rev. 85, 93 (2011).

In the case of the 1864 Act of Congress creating the Northern Pacific Railroad, there was nothing that distinguished the limited right-of-way ownership granted under the 1864 law from grants in other similar 19th Century Congressional Acts. The 1864 Act did create a land subsidy grant to the Northern Pacific that was larger than previous land subsidy grants, but that is different than ownership interest in the right-of-way under the 1864 Act, which was no greater than – and in some ways more limited than – the right-of-way interest granted in other similar Acts. For example, all ownership was subject to cancellation if the deadlines for completing the transcontinental railroad were not met; further, Northern Pacific was prohibited from encumbering the right-of-way with any mortgage or other lien. Northern Pacific’s interest in the right-of-way was therefore less than an ordinary easement and did not in any way constitute a fee simple title in the real estate underlying the right-of-way that could be transferred. There is nothing in the 1864 Act that cancels North Dakota’s future interest in the riverbed underlying the bridge under the Equal Footing and Public Trust Doctrines.

Because this is a legal issue that affects State ownership of the riverbed of each navigable river in all 50 States under the Equal Footing and Public Trust Doctrines, FORB asks that the USCG request a United States Solicitor General’s opinion on the ownership issues raised. Similarly, because this issue affects not only North Dakota’s ownership of the riverbed beneath the bridge at the time of becoming a State, but also the entire riverbed of the Missouri River in North Dakota in 1889, we ask that you also request an opinion from North Dakota’s Attorney General on this matter. Even more relevant and urgent is the apparent state ownership of the Northern Pacific Railroad bridge BNSF proposes to demolish as part of its permit application currently under consideration by the USCG. Before granting a permit in April 2022 approving BNSF’s construction of a new bridge and demolition of the historic Northern Pacific Railroad bridge, as BNSF has proposed, the USCG is responsible for determining whether BNSF has a legal right to do so.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Zimmerman". The signature is fluid and cursive, with the first name "Mark" and last name "Zimmerman" clearly distinguishable.

Mark Zimmerman
President of FORB

Enclosure: The Legal History of Federally Granted Railroad Rights-of-Way and The Myth of Congress’s “1871 Shift”

cc with encl:

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