

Memorandum

To: United States Coast Guard (USCG)

From: Friends of the Rail Bridge (FORB)

Date: February 8, 2022

Re: Ownership of the Historic 1883 Northern Pacific Railway Bridge between Bismarck and Mandan, Dakota Territory, transferred to the State of North Dakota on November 2, 1889, under the “Equal Footing” and “Public Trust” Doctrines when North Dakota became the 39th State admitted to the Union

- 1. There is no documentation or other credible evidence in either the National Historic Preservation Act (NHPA) consultation record or the National Environmental Policy Act (NEPA) record relating to the permit that Burlington Northern Santa Fe (BNSF) railway seeks from USCG that BNSF is the owner of the Historic 1883 Northern Pacific Railway Bridge between Bismarck and Mandan, North Dakota. On the contrary, the law is quite clear that the bed of the Missouri River up to the high-water mark, as well as any permanent fixtures attached to that riverbed up to the high-water mark, were transferred to the State of North Dakota under the “Equal Footing” and “Public Trust” Doctrines when North Dakota became the 39th State admitted to the Union on November 2, 1889. USCG’s assumption without documentation that BNSF is the owner of the Historic 1883 Northern Pacific Railway Bridge is legally flawed and factually wrong.**

In the January 28, 2022, dispute resolution meeting between USCG and FORB, USCG indicated that USCG was sympathetic to wanting to save the Historic 1883 Northern Pacific Railway Bridge but that USCG’s hands were tied because the Historic Bridge is the property of BNSF and USCG has no authority to stop them from tearing it down. The minutes from the January 28th meeting show this assumption of ownership of the bridge by BNSF as the primary reason that USCG cannot require BNSF to take steps under either NHPA or NEPA to consider alternatives to preserve the Historic Bridge:

Mr. Dunn reiterated that, as discussed during consultation prior to implementation of the PA, there are no authorities (statute, regulation) that require or even allow the Federal Government to require a private entity to develop project alternatives that are outside the scope of the project’s purpose and need. Likewise, there is no authority for the Coast Guard to require a private entity to pay for additional costs that may result from such an alternative. BNSF does not intend to retain the bridge due to the liability associated with keeping the bridge in their right-of-way when it is no longer used for train traffic.

For the reasons discussed in this memorandum, USCG’s underlying assumption that BNSF owns the Historic Bridge is legally flawed and factually wrong. There is, in fact, very little discussion in either the NHPA or NEPA record of the facts and history that are essential for establishing who owns the Historical Bridge and why the Bridge is a historical landmark of unmatched significance to the formation and settlement of North Dakota and the upper Great Plains. This memorandum will summarize and introduce into the record some of the key published

documents, studies, and other evidence (much of it photographic) addressing the issues of who owns the bed of the river beneath the bridge as well as the bridge itself.

2. Nothing in the Louisiana Purchase, under which the United States obtained ownership of the part of the Missouri River that the Historic 1883 Northern Pacific Railway Bridge crosses, reserves any interest that impairs ownership of the Historic Bridge by the State of North Dakota under the “Equal Footing” and “Public Trust” Doctrines.

The United States obtained ownership of the Missouri River where the Historic Bridge crosses through the Louisiana Purchase.

In 1803, the United States acquired the territory of Louisiana from Napoleonic France through purchase for \$15 million dollars. James Monroe negotiated this purchase in Paris on behalf of President Thomas Jefferson and the United States. The Louisiana Purchase nearly doubled the size of the United States in 1803 and included part or all of fifteen States, including the part of North Dakota where the Historic Bridge crosses the Missouri River between Bismarck and Mandan. This is relevant to this analysis because the exception to title and ownership of the riverbed up to the river’s high-water mark passing to the State under the “Equal Footing” and “Public Trust” Doctrines is when there is a valid grant of title to private ownership before such lands are ceded to the United States.



The general rule is that the foreign law in force at the time of the grant will govern the area, nature and extent of such conveyances. In other words, a valid grant of title to submerged lands into private ownership before such lands were ceded to the United States would be preserved,' thereby preventing the acquisition of title by the state through operation of the equal footing doctrine which granted to new states the same "right,

sovereignty, and jurisdiction . . . as the original states possess within their respective borders", including title to lands under navigable waters.¹ (Emphasis supplied.)

There was no valid grant of title to submerged lands up to the high-water mark where the Historic Bridge crosses the Missouri River between Bismarck and Mandan before such lands were ceded to the United States under the Louisiana Purchase in 1803 (or, for that matter, anywhere else along the upper Missouri River for lands ceded under the Louisiana Purchase). Thus, no exception exists to title passing to North Dakota at the Historic Bridge crossing under the prior ceded lands to private parties' exception to the Equal Footing and Public Trust Doctrines.

3. The “Equal Footing” and “Public Trust” Doctrines are well-established rules of law that have passed title to the riverbed of navigable waters up to the high-water mark to States since the United States was formed. Since then, when States in addition to the 13 original States were admitted to the Union, title to the riverbed of navigable rivers up to the high-water mark became the property of the newly admitted State. There is no dispute that the Missouri River at the Historic Bridge crossing was navigable at the time North Dakota became a State. Thus, the riverbed up to the high-water mark (and fixtures attached to that property) passed to North Dakota when it was admitted to the Union on November 2, 1889, for the reasons discussed below.

As discussed above, the foreign law in force at the time of the grant (in this case the law of France at the time of the Louisiana Purchase) governs the transaction up to the time those lands are ceded to the United States. After those lands become part of the United States, the laws of the United States and the States where those lands are located are the controlling law.

Under the Equal Footing Doctrine, a State, upon entering the Union, gains title to the beds of waters then navigable or tidally influenced, subject only to federal powers under the Constitution.² The Public Trust Doctrine sets forth what rights are protected in riverbeds up to the high-water mark in territories held by the United States up to the time those territories become States. *Shively v. Bowlby, et al.*, 151 U.S. 1, 2-85 (1894) discusses in detail the Equal Footing Doctrine as applied in each State up to the time of that decision in 1894. Based on that discussion, *Shively* summarizes the following rule as it applies to the Equal Footing and Public Trust³ Doctrines:

The congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior or on the coast, above high-water mark, may be taken up by actual occupants, in order to encourage the settlement of the country, but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation, and fishery, and for the

¹ Frank E. Maloney, *THE ORDINARY HIGH WATER MARK: ATTEMPTS AT SETTLING AN UNSETTLED BOUNDARY LINE*, 13 Land and Water Law Review 465, 467 (1978), citing among others *Knight v. United Land Ass'n*, 142 U.S. 161 (1891); *Mumford v. Wardwell*, 73 U.S. (6 Wall.) 423, 436 (1867); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845).

² *Pollard's Lessee*, supra, 44 U.S. at 222-23 and 228-29 (1845).

³ See *Martin v. Waddell's Lessee*, 41 US 367 (1842); *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892).

improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government, but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future states, and shall vest in the several states, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older states in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals, as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the state, after it shall have become a completely organized community.

Shively, 151 U.S. at 86.

In sum, riverbeds up to the high-water mark “shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the state, after it shall have become a completely organized community.”

4. Nothing in the 1864 Act by Congress that created the Northern Pacific Railroad, the Enabling Act that created the State of North Dakota, or the North Dakota State Constitution either transfers or shows an intent to transfer the riverbed of the Missouri River up to the ordinary high-water mark at the crossing of the Missouri River at the Historic 1883 Northern Pacific Railway Bridge between Bismarck and Mandan.

Beginning in the 1830s, Congress granted railroads thousands of miles of rights-of-way across the public lands. Those rights-of-way, however, were consistently granted in language that created the equivalent of an easement that granted a right-of-way, but that did not extinguish federal ownership of the land subject to that right-of-way or change state ownership of riverbeds up to the high-water mark under the Equal Footing and Public Trust Doctrines when a new State is admitted into the Union.

Over the course of the nineteenth century, Congress acted consistently when it granted railroad rights-of-way through the federal public lands. Congress settled on legal terminology in the late 1830s, early in the development of American railroads, and used that terminology with relatively little variation throughout the rest of the century. Congress repeatedly referred to its granted rights-of-way as “easements” or as similar to easements. But it viewed federally granted railroad rights-of-way as very different from mere common-law easements. Congress considered the rights-of-way appropriations of public lands for a public purpose, which made those lands unavailable for subsequent settlement or acquisition. Through its enactments and in its debates, Congress indicated its consistent intent that the land underlying rights-of-way was owned by the government, which was either implicitly or explicitly subject to reversion if the purpose of the appropriation terminated. Finally, Congress confirmed this view of the property by asserting the right to revoke and forfeit railroad grants back to the United States and to regulate the disposition of forfeited and abandoned railroad rights-of-way.⁴

⁴ 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, 149-50.

Nothing in the 1864 Act by Congress that created the Northern Pacific Railroad creates anything more than a right-of-way easement across the Missouri River at the crossing for the Historic 1883 Northern Pacific Railway Bridge between Bismarck and Mandan, Act of July 2, 1864, ch. 217, 13 Stat. 365; nor is there any language in chapter 217 that terminates or extinguishes the ownership interest in the riverbed up to the ordinary high-water mark held in trust by the United States which was transferred to North Dakota when it became a State. The same is true for the Enabling Act that created the State of North Dakota. 25 U.S. Statutes at Large, ch. 180, p 676 (February 22, 1889).

The State Constitution for North Dakota was subject to significant influence from the Northern Pacific Railroad when it was drafted in 1889. See Robert Vogel, *Sources of the 1889 North Dakota Constitution*, 65 N.D. Law Rev. 331 (1989), a copy of which is attached to this memorandum. Nothing in the North Dakota Constitution, however, diminishes State ownership of the riverbed of the Missouri River up to the ordinary high-water mark. On the contrary, the North Dakota State constitution prohibits North Dakota's legislature from diminishing or extinguishing such interests:

No law shall ever be passed by the legislative assembly granting to any person, corporation or association any privileges by reason of the occupation, cultivation or improvement of any public lands by said person, corporation or association subsequent to the survey thereof by the general government. No claim for the occupation, cultivation or improvement of any public lands shall ever be recognized, nor shall such occupation, cultivation or improvement of any public lands ever be used to diminish either directly or indirectly, the purchase price of said lands.

N.D. State Const. Art. IX, Sec. 9

North Dakota law in fact has strict requirements that apply when property such as the Historic 1883 Northern Pacific Railway Bridge is owned by the State:

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, unless section 55-02-07.2 applies to the site. Notification of the director's opinion of significance must be communicated to the appropriate governing official. The state historical board through the director, within sixty days of written notification to it by the appropriate governing official of the state or political subdivision's desire, need, or intent to destroy, alter, remove, or otherwise dispose of a significant artifact or site, shall provide the governing official written direction for the care, protection, excavation, storage, destruction, or other disposition of the significant artifact or site. The state and its political subdivisions shall cooperate with the director in identifying and implementing any reasonable alternative to destruction or alteration of any historical or archaeological artifact or site significant in understanding and interpreting the history and prehistory of the state before the state historical board may approve the demolition or alteration.

NDCC § 55-02-07 (emphasis supplied).

As the Northern Pacific Transcontinental Railroad was being built, numerous Bills were introduced in Congress for forfeiture because of delays in construction beyond the deadlines set in the Act of July 2, 1864, ch. 217, 13 Stat. 365.⁵ After the many years of trying, in 1890 any ownership that the Northern Pacific had in State-owned interests in real property under the Act of July 2, 1864, ch. 217, 13 Stat. 365, were forfeited under the general forfeiture provisions of an 1890 law. Statutes, Vol. 26, p. 496, September 29, 1890.⁶

In summary, ownership of the riverbed up to the ordinary high-water mark was transferred to North Dakota when it became a State on November 2, 1889. Nothing in the 1864 Act by Congress that created the Northern Pacific Railroad, the Enabling Act that created the State of North Dakota, or the North Dakota State Constitution either transfers or shows an intent to transfer the riverbed of the Missouri River up to the ordinary high-water mark at the crossing of the Missouri River at the Historic 1883 Northern Pacific Railway Bridge. The assumption by USCG in the NHPA and NEPA proceedings that BNSF owns the Historic Bridge is not supported in the record.

5. Factual issues related to ownership of the Historic 1883 Northern Pacific Railway Bridge must be addressed by USCG before issuing any permit that would allow BNSF to destroy the Historic Bridge. The factual issue of whether all four piers and the Historic Bridge's superstructure were permanent fixtures attached to the land, and thus were transferred to North Dakota at the time of transfer of the riverbed of the Missouri River up to the ordinary high-water mark when North Dakota became a State on November 2, 1889, must be addressed in both the NHPA and NEPA proceedings before the USCG can issue any permit.

Under both federal and State common law, as well as North Dakota statutory law, fixtures that are part of the real property are transferred with the land. The following provisions of the North Dakota Century Code state the provisions of North Dakota law that apply to the transfer of fixtures to the land:

NDCC § 47-01-02. Property - Classification. Property is:

1. Real or immovable; or
2. Personal or movable.

NDCC § 47-01-03. Real property defined. Real or immovable property consists of:

1. Land;
2. That which is affixed to land, including manufactured homes as defined in section 41-09-02 with respect to which the requirements of subsection 6 of section 47-10-27 have been satisfied;

⁵ See Ted Schwinden, *Northern Pacific land grants in Congress* (University of Montana Masters Thesis 1950); Darwin P. Roberts, *supra*, *THE LEGAL HISTORY OF FEDERALLY GRANTED RAILROAD RIGHTS-OF-WAY AND THE MYTH OF CONGRESS'S "1871 SHIFT"*.

⁶ Ted Schwinden, *supra*, *Northern Pacific land grants in Congress*, at pp. 85-86.

3. That which is incidental or appurtenant to land; and
4. That which is immovable by law.

NDCC § 47-01-04. Land defined. Land is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance.

NDCC § 47-01-05. Fixtures defined. A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs, or imbedded in it, as in the case of walls, or permanently resting upon it, as in the case of buildings, or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws.

Current North Dakota State Geologist Edward Murphy's 1995 article on the history of the construction and upgrades to "The Northern Pacific Railway Bridge at Bismarck" provides much of the information needed to determine whether each of the four piers that support the Historic 1883 Northern Pacific Railway Bridge were located on the riverbed below the ordinary high-water mark at the time ownership of the riverbed was transferred to North Dakota in November 1889. A copy of this article is attached to this memorandum for easy reference.

The navigability of the Missouri River at the crossing for the Historic 1883 Northern Pacific Railway Bridge should be an uncontested issue of fact. It is documented in Lewis & Clark's Journals for their 1802-04 expedition to explore the territory transferred to the United States under the Louisiana Purchase and the areas west of Louisiana territory to the Pacific Ocean. It is also documented by, for example, the journey of the Far West steamboat up the Missouri River after the Little Bighorn on June 25, 1876, as well as countless books and historical documents that document and recount steamboat traffic on the Missouri River from St. Louis, Missouri, to Fort Benton in Montana until more than a decade after the 1883 Northern Pacific Railway Bridge was completed.

The factual issue is whether one or more of the piers of the Historic Bridge were located within the riverbed of the Missouri River below the ordinary highwater line on November 2, 1889, and in a way that made them permanently affixed to the riverbed so that all or part of the bridge itself was transferred to North Dakota with the riverbed. The 1851 case, *Howard v. Ingersoll*, 54 U.S. 381 (1851), sets forth the three factors that have been applied in the 170 years since *Ingersoll* was decided to determine the ordinary high-water mark that is used to determine on a case-by-case where the ordinary high-water line was at the relevant date – in this case its location at the time when North Dakota became a State. See generally, Frank E. Maloney, *THE ORDINARY HIGH WATER MARK: ATTEMPTS AT SETTling AN UNSETTLED BOUNDARY LINE*, 13 Land and Water Law Review 465 (1978), attached to this memorandum.

All four piers of the Historic Bridge were permanently affixed to the land when they were constructed in 1881 and 1882 as described in Edward Murphy's attached article. For example, the "caisson for pier 2 was bottomed forty-six feet below the base of the river; the caisson for pier 3 was sunk thirty-nine feet" into the sandstone bedrock. Murphy at page 8. The western pier of the historic bridge – the pier Murphy labels as pier

4 – was permanently affixed to the riverbed on 161 timber piles on a part of the channel that was being altered by a dike to build up the riverbed below the ordinary high-water mark of the river before the bridge was constructed (Murphy at pages 6-10). The eastern pier (labeled by Murphy as pier 1) was located on property below the high-water mark that was also regularly flooded. As this photo from Murphy’s article shows, less than a year after construction of the bridge was completed, all four piers of the Historic 1883 Northern Pacific Railway Bridge were covered by the waters of the Missouri River to within a few feet of their tops.

Numerous historical photos taken during and after construction of the Historical Bridge establish that all four piers lie within the boundaries of the ordinary high-water mark of the Missouri River at the time North Dakota became a State. The electronic files for these photos are large, so FORB asks that it may supplement the record with these photos with a separate submission. The photos on pages 7-12 of Murphy’s attached article show evidence of movement of the sandbars, the vegetation along the banks of the river, and the photos of the constant seasonal and annual levels of the Missouri River, all of which show that the ordinary high-water mark of the Missouri River at the time of statehood was above the location of all four piers.



In summary, the evidence shows that all four piers of the Historic 1883 Northern Pacific Railway Bridge were located on the riverbed of the Missouri River below the ordinary highwater mark at the time of Statehood. Therefore, the Historic Bridge was transferred as a fixture attached to the land at the time North Dakota became a State on November 2, 1889, pursuant to the “Equal Footing” and “Public Trust” Doctrines discussed in this memorandum.

