

Subject Section 106 Consulting Parties Meeting #16

Project BNSF Bismarck Bridge Replacement Project

Prepared by Abby Korte, Aimee Angel, Lori Price

Location GoTo Remote Meeting **Date/Time** May 14, 2021 2:00 pm CDT

Participants	Organization	Time Joined (EDT)	Time Left (EDT)
Abby Korte	Jacobs	2:57	4:50
Aimee Angel	Jacobs	2:57	4:50
Alexis Clark	ACHP	2:51	4:50
Amy McBeth	BNSF	3:05	4:50
Amy Sakariassen	NTHP	2:56	4:50
Austin Hurst	BNSF	2:59	4:50
Ben Ehreth	City of Bismarck	2:52	4:50
Betsy Merritt	NTHP	3:05	4:50
Bill Peterson	ND SHPO	2:57	4:50
Brian Dunn	USCG	2:55	4:50
Chad Orn	ND DOT	2:58	4:50
Chris Wilson	ACHP	3:00	4:50
David Mayer	Bismarck Parks and Recreation District	3:01	4:50
Emily Sakariassen	Preservation North Dakota	2:56	4:50

J Signe Snortland	FORB	2:52	4:50
Jim Neubauer	City of Mandan	4:36	4:50
Kitty Henderson	Historic Bridge Foundation	2:59	4:50
Kyle Sumsion	BNSF	2:58	4:50
Lori Price	Jacobs	3:01	4:50
Lorna Meidinger	ND SHPO	2:57	4:50
Mark Zimmerman	FORB	3:00	4:50
Matt Robertson	USCG	3:22	4:46
Mayor Steve Bakken	City of Bismarck	3:02	4:50
Mike Herzog	BNSF	2:54	4:50
Mitch Flanagan	Burleigh County	2:55	4:50
Nick Bradbury	FORB	3:08	4:50
Shelly Sugarman	USCG	2:52	4:50
Susan Wefald	FORB	3:00	4:50
Toni Erhardt	USACE	2:59	3:44
██████████	Unknown caller	2:54	4:50
██████████	Unknown caller	2:52	2:52
██████████	Unknown caller	3:01	3:05
██████████	Unknown caller	2:54	4:50

Notes:

Shelly Sugarman opened up the meeting with an introduction and thanks to the ACHP for hosting the meeting. S. Sugarman then did roll call and set the ground rules for the meeting.

Brian Dunn stated that Rob McCaskey was unable to attend as he has been deployed to a bridge issue in Memphis, TN. B. Dunn then covered the agenda for the meeting:

1. Discuss the status of the revised APE.
2. Discuss the PA milestones and associated timelines.
3. Review the proposed PA amendments brought forth by FORB.

1. Discuss the status of the revised APE.

Lori Price then presented the expanded APE. The changes requested are based on the scope of analysis in the DEIS and include both a greater project footprint to cover the various DEIS alternatives and the proposed western construction access route. Shared screen to show map at the request of Betsy Merritt.

Signe Snortland: What is BNSF's discussions with NDDOT about?

Mike Herzog: The location of the access routes, control of traffic, and permissions for access route.

S. Snortland: The original Class III survey was only on the original APE. Has there been any additional Class III investigation elsewhere within the expanded APE?

L. Price: A literature search was done that suggested there is no potential for historic properties within the expanded APE.

Emily Sakariassen: Will you follow up with any additional fieldwork to confirm?

L. Price: Additional fieldwork is not indicated based on the land use (vacant land/ agricultural field, existing roadways, and interstate and railroad ROW).

S. Snortland: What about subsurface resources?

L. Price: Archaeological field work was done for the vacant land.

E. Sakariassen: Has SHPO commented on the need for any additional survey?

Lorna Meidinger: We have only commented on the footprint. We've had no discussion yet about additional work that may be needed.

L. Price: We can talk about next steps. We just wanted everyone to be aware of the additional footprint needed.

Betsy Merritt: Who owns the agricultural parcel?

M. Herzog: I do not recall the name – it's non-governmental.

B. Merritt: What activities will be taking place within the access route APE?

M. Herzog: Details are currently being sorted out with NDDOT and other units of government. It may require road grading for heavy equipment. Still in discussion with the agency but generally minor grading and adding fill to facilitate access roads.

B. Merritt: Will it be overlapping the NDDOT ROW?

M. Herzog: Part of it on city streets, part of it on NDDOT.

S. Snortland: Are we following the process outlined in the PA for revising the APE?

L. Price: Yes, we are. Reviewed the PA process for APE revision and steps taken so far.

S. Sugarman: We have not sent the revised APE boundary to the consulting parties yet but will soon, to start the 30-day comment period.

2. Discuss the PA milestones and associated timelines.

B. Dunn: Discussion of the outstanding milestones:

- FORB to establish a PPP:
 - To date, FORB has not identified a partner or lessee capable of taking over the bridge.
 - There is no plan to establish a government body capable of taking over the bridge.
- Floodplain evaluation/ CLOMR:
 - B. Dunn identified the status of requests and timeline of communication with FORB.
 - B. Dunn listed out all of the outstanding data requests:
 - Confirmation of whether the HEC-RAS model for their proposed culvert mitigation would lead to a no net rise in the BFE. If additional floodplain mitigation is required to achieve no net rise, need information regarding what the additional mitigation would involve.
 - Information from FORB and NDDOT about the environmental impacts associated with the construction and maintenance of the culverts and any other mitigation required to achieve no net rise, including impacts to wetlands, endangered species, water quality, and ice flow.
 - Confirmation from NDDOT that they are committed to the design, implementation, construction, and maintenance of these culverts.

- Information from NDDOT about permits and land access requirements for construction and maintenance of the culverts, to include any requirement for authorizations from the FHWA. Information regarding maintenance should also address the potential for ice or debris jams in the culverts.
- Information from NDDOT about how long the process will take to obtain permits and funding for the culverts and how long it will take for the culverts to be constructed.
- Information from FORB and NDDOT about who will fund the design, construction, and maintenance of the culverts and how much each will cost.

B. Dunn: Mark Zimmerman, do you have an update on the status of the above milestones?

Mark Zimmerman: No update at this time. Mr. Ackerman is working on it but I have no response from Mr. Ackerman.

B. Dunn: Is there any discussion?

S. Sugarman: Mr. Zimmerman, have you had any discussions with NDDOT, any commitment from them on more pointed questions about culvert design, implementation, cost, etc.?

M. Zimmerman: I had a brief call with Mr. Ackerman and Ron Henke. Cannot speak for NDDOT, but Mr. Henke said that NDDOT "did not see a red flag." The idea was not rejected. There has been no further discussion.

3. Review the proposed PA amendments brought forth by FORB.

S. Snortland: Referred to the Section 106 applicant toolkit, ACHP guidance, and the regulations. Regulations call out applicant as responsible for mitigation. All amendments deal with shifting responsibility to BNSF from FORB for mitigation. S. Snortland then walked through all of FORB's proposed edits to the PA as L. Price was sharing the edits on screen.

S. Snortland: First amendment - FORB submitted an alternative that has no net rise because it retains the existing piers. So no reason to do a CLOMR. Second amendment - BNSF would be responsible for mitigation for new alternative with net rise. Third amendment - FORB having great difficulty getting a public partner because BNSF is going to all of the meetings and saying that bridge rehabilitation is going to cost \$60-90M. FORB is requesting an extension on establishment of the PPP to get these amendments made and eliminate the \$60-90M, and be able to get a PPP. Next, eliminated "all" costs so PPP is only responsible for costs to convert the bridge to non-rail use - \$6.9M. Eliminate costs over and above those for BNSF's proposed action. Would be nigh unto impossible to make a fundraising plan for that amount. BNSF should pay the cost for their own bridge. Next, costs and mitigation in table should be BNSF's responsibility, not FORB's.

B. Dunn: I would like to talk about how we got to where we are and why things are in the PA like they are. If there is not a cost share, the project is not technically feasible. If we double the cost of the bridge, it is not economically feasible.

C. Wilson: The DEIS will be published, and the FEIS cannot be published until the Section 106 consultation is complete. We have been trying to mitigate adverse impacts this whole time. The PA bought FORB time to evaluate local capacity to retain the bridge. This is a bigger issue to me. There is no local capacity. Intention of the PA was to pursue that local interest. I agree with Signe that the dollar figure in the PA has scared away public partners. Is there local capacity?

S. Snortland: Capacity within the local community is dependent upon the \$60 -90M figure.

E. Sakariassen: I agree that the \$60-90M figure handcuffs discussions with potential public partners. The funding discussion should be limited to the \$6.9M that NDSU identified for conversion to a pedestrian trail.

B. Merritt: We have been worried for a long time about poison pills within the PA. The \$60-90M is a poison pill that needs to be detoxed from the PA. Shifting responsibilities from the applicant to preservation advocates is unprecedented. The \$60-90M is a poison pill.

M. Herzog: If we are saying that the additional bridge cost of \$60-90M is a poison pill, then the poison pill is the truth. BNSF negotiated the PA in good faith and met all timelines. BNSF is opposed to all proposed amendments.

S. Snortland: We are meeting with the FORB board next week and recommending dispute resolution or termination of the PA.

C. Wilson: I would like to discuss those terms because they have real meaning. The PA has a clause for dispute resolution and the ACHP, where I work not Signe, has a role in that. Entering into dispute resolution should only be done when conflict is well thought out. Termination can only be enacted by the USCG or ACHP. FORB cannot terminate. Let's cover the thresholds:

- The Amendment process – is there any way to discuss the amendments further? Are there any tweaks that can be made? I agree that the transfer of costs is bizarre and unheard of. Can we tweak it?
- Dispute resolution – if something can't be resolved, then the ACHP makes a formal comment to the USCG and the USCG makes the call.
- Termination is not in the cards. It is a lose-lose proposition. Any mitigation in the PA/MOA is lost with termination.

B. Dunn: Even if amendments are adopted, there is no feasible alternative for the DEIS. The cost issue becomes important under NEPA. Only technically and economically feasible alternatives can be in the EIS. Technical feasibility depends on economics. There is no authority for a federal agency to tell a private entity that they need to double the cost of their project. Avoiding impacts does not appear to be technically or economically feasible.

S. Snortland: We are happy to discuss the amendments, but they have not been well received by BNSF. To clarify, FORB can terminate as the PA does not differentiate between a signatory and an invited signatory.

C. Wilson: Only signatories, not invited signatories can terminate. Only the USCG and ACHP.

S. Snortland: Can we request dispute resolution?

C. Wilson: Yes, there are two issues—the first is failure to amend the document. That doesn't necessarily result in dispute resolution. We all signed the document. I know there was a letter from FORB that came after, but we all signed the document. It's not perfect. FORB needs to be clear on what is being disputed. What is the complaint about the PA? Make it very specific focused and targeted. ACHP has a deadline- we review everything, we provide a finding to the agency, the agency has to respond. ACHP is not a "final word." We just shed light on the process and respond. USCG has responsibility to reply to findings and the process continues. I'm positive that non-profit that's part of the discussion cannot terminate, but I'll check with General Counsel.

B. Merritt: FORB intends to begin dispute resolution prior to termination. But the Section 106 regulations - 35 CFR800.6(c)2 – definition of invited signatories, which is what FORB is– "The agency official may invite additional parties to be signatories to a memorandum of agreement. Any such party that signs the memorandum of agreement shall have the same rights with regard to seeking amendment or termination of the memorandum of agreement as other signatories." That's the provision of the regs that we were looking at.

C. Wilson: What would be the consequences of that? If FORB terminated the document, what would occur? If the PA is terminated, and no MOA can be concluded, no mitigation would occur. Termination removes all negotiations and all mitigation. That's why we call it a nuclear option. Termination is NOT recommended.

B. Merritt: Depends on how much mitigation is on the table. Right now it isn't very much.

C. Wilson: We haven't even discussed mitigation yet.

E. Sakariassen: I'm trying to understand the process and there is language about termination that is appealing from the perspective of trying to advocate for preservation of the resource when one is met with less enthusiasm than one would hope for in a collaborative process but I think the reason it's appealing is that termination sets timelines and puts pressure on everybody to think more carefully, creatively, and critically about amendments and the amendment process so I'd like to talk about the amendments.

C. Wilson: I've conducted terminations, and Betsy has participated in terminations. There are no amendments after termination occurs. It removes everything. It's a failure.

B. Dunn: We are moving forward with our NEPA process. We are putting out a DEIS on June 13. I am requesting concurrence from the ACHP and SHPO on moving from Stipulation 5 to Stipulation 6. There is no alternative to retain the bridge in the DEIS. The information that FORB has provided is contained in the DEIS. The alternative to retain the substructure of the bridge – BNSF has already addressed that substructure cannot support a new bridge, so that alternative does not work. Without a CLOMR that shows another alternative can retain the bridge, we do not have an alternative to move forward in the DEIS. We are requesting concurrence from SHPO/ACHP to move to Stipulation 6.

M. Zimmerman: Are you asking for that concurrence at this time?

B. Dunn: No, I'm not - I will go out to them separately.

M. Zimmerman: Do we have any input?

B. Dunn: No, that's between SHPO/ACHP and USCG.

M. Zimmerman: In your letter to me asking for additional information for the DEIS, is that definitive? Is there not an amendment that would allow Mr. Ackerman additional time ?

B. Dunn: The DEIS by the timeline, will go out on June 13.

M. Zimmerman: If a CLOMR is submitted after that, would that be considered?

B. Dunn: Possibly but not guaranteed.

M. Zimmerman: Why not?

B. Dunn: Because the environmental document will already be out for public comment.

M. Zimmerman: You seem to be hung up on timelines and deadlines. Can you tell me what your timeline is for asking ACHP and SHPO to move to Stipulation 6?

B. Dunn: Likely next week.

M. Zimmerman: What does the group of consulting parties like FORB get to do? Do we get to weigh in on our position of why not to move to Stipulation 6?

B. Dunn: I don't believe so. If you look at the PA, moving to Stipulation 6 is based on not meeting milestones and not having the ability to move on with Stipulation 5 and that's where I think we are right now.

C. Wilson: Question for Betsy. If FORB were to terminate, does that mean they withdraw from consultation the way a SHPO would?

B. Merritt: There is a difference between termination of the PA and termination of consultation.

C. Wilson: I need to discuss with the ACHP general counsel. We need to separate failure to amend versus dispute resolution versus termination.

S. Snortland: We request dispute resolution over the \$60-90M.

B. Dunn: Can I ask that we stop the termination discussion? If there's a request for termination, we can have a meeting to discuss that, but I think it's detracting from the overall conversation.

C. Wilson: Sure, I'll table it.

B. Dunn: We are running out of time today. We are putting out the DEIS. We intend to hold a virtual public meeting probably June 24 or June 30. We are looking to schedule an MOA mitigation meeting later part of May. We still need to get information about the proposed mitigation that has been submitted so please send that to Rob McCaskey. To wrap up for this meeting, my intent right now is to move on to Stipulation 6 and I'll notify everybody when we send that to ACHP and SHPO next week.

S. Sugarman: In order to prepare for that MOA meeting to discuss mitigation, we have to have questions answered in the Pending Mitigation Items document. We'd asked for that over a month ago. You might have to reach out to the other parties to get more information on contracting, funding, cost, etc. We're hoping to get that by next Friday, May 21. So then that will inform and help us create an agenda for that MOA meeting.

Mayor Bakken: One of the things we'd like to talk about, and I've talked to North Dakota Parks, is to reconstitute any of the materials as they are taken down, whether it be bridge sections we may be interested in or the granite blocks. Any of those that may be available, we'd be interested in acquiring them.

B. Dunn: Yes, we can look at that. I think there's already a mitigation proposal to repurpose parts of the bridge and we can add that to that mitigation proposal.

Mayor Bakken: Do you need that in writing?

B. Dunn: If you could shoot me and Rob McCaskey an email so we can make sure it's added to the mitigations, that would be great.

Mayor Bakken: Perfect. Thank you.

B. Dunn: I appreciate the discussion and I know it's not going the way everybody would like it to go but I appreciate everybody's efforts and I think the path forward we're proposing is the best way to go forward. We look forward to discussion on the MOA and we will talk to you all probably at the end of the month.

Meeting adjourned at 4:50pm.