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March 11, 2022

**VIA US MAIL AND EMAIL**

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**Re: Bismarck Bridge Programmatic Agreement Dispute Resolution – Dispute of Bridge Ownership by Friends of the Rail Bridge**

Dear Gentlemen:

This package constitutes BNSF Railway Company’s (“BNSF”) response to the February 8, 2022 letter from Friends of the Rail Bridge (“FORB”) to the U.S. Coast Guard’s Office of Bridge Programs (“USCG”) in which FORB disputes BNSF’s ownership of the railroad bridge crossing the Missouri River between Bismarck and Mandan, North Dakota (the “Bismarck Bridge”). FORB’s eleventh-hour, frivolous assertions should not further stall conclusion of the Section 106 process, publication of the Final Environmental Impact Statement, and issuance of a Record of Decision (“ROD”) for the BNSF Bridge Replacement Project.

As addressed in detail in the enclosed memorandum and supporting documentation, FORB’s argument that the Bismarck Bridge is owned by the State of North Dakota is without merit and should be promptly rejected based on the information now before the USCG. BNSF offers this comprehensive analysis in the attached memorandum, not simply in defense of this essential infrastructure project, but because FORB’s theories would adversely impact hundreds of rail structures across the country owned by BNSF as well as other railroads.

After five years and more than 20 consulting party meetings, FORB’s unsupported theory should be seen for what it is – another effort to delay the project. FORB’s actions over the past year or more reveal a party that has not participated in the Section 106 process in good faith. Its claims of signing the Programmatic Agreement (“PA”) “under duress” are questionable. It now appears that FORB had no intention of fulfilling the PA stipulations. The only fair conclusion of the process must be to finalize and execute a Memorandum of Agreement (“MOA”). The consulting parties have had a fair opportunity to review the current draft MOA and its reasonable and well-considered stipulations regarding the existing bridge.

The information provided herein conclusively demonstrates that BNSF Railway owns the Bismarck Bridge over the Missouri River. With FORB's ownership claims unfounded, we urge the USCG to finalize the MOA and give consulting parties the opportunity to become signatories to or concur in that document. The USCG should conclude the NEPA process forthwith and issue a ROD approving the Right to Build permit for the BNSF Replacement Project.

The attached memorandum goes into greater detail, including evidence and case law that outlines BNSF's ownership of the Bismarck Bridge, however, below is a summary of the key points in our findings.

**BNSF's Title:**

First and foremost, BNSF has clear title to the bridge under the 1864 Act of Congress, which granted BNSF's predecessor, Northern Pacific Railroad Company, a right of way through public lands to build and maintain a railroad, including all necessary "draws, culverts, [and] bridges" connecting Lake Superior to the Pacific Coast. Historical records confirm that the Bismarck Bridge was built by the Northern Pacific Railroad under the authority of the 1864 Act and has been continuously operated by Northern Pacific Railroad's successors, including BNSF, since at least 1883. Federal law is clear that all railroad property located within the right of way used in building and operating the railroad, including bridges, becomes a part of the real estate of the railroad company.

Thus, having acquired the section of railroad line in question and continuously maintained use of the Bismarck Bridge after its construction was completed by BNSF's predecessor in the early 1880s, BNSF has exclusive possession and title to the Bismarck Bridge.

**Title to the Bismarck Bridge Did Not Pass to North Dakota in 1889:**

FORB's argument relies on a theory that that title to the Bismarck Bridge automatically passed from the Northern Pacific Railroad Company to the State of North Dakota when it became a state in 1889 simply because the bridge crossed the Missouri River. However, FORB cannot cite to any case law supporting this theory that the Missouri River's status as a navigable waterway deprived the railroad of its ownership of the Bismarck Bridge when the State of North Dakota achieved statehood on November 2, 1889. On the other hand, both federal and state case law, including one federal decision that specifically mentions the Bismarck Bridge by name, explain that railroad bridges built over rivers are part of and owned by the railroad just the same as railroad bridges built over land.

**Action to Divest BNSF of the Bismarck Bridge Barred as a Matter of Law:**

Over 132 years have passed since North Dakota achieved statehood in 1889, when, as argued by FORB, North Dakota would have taken title to the Bismarck Bridge. BNSF and its predecessors have continuously operated the Bismarck Bridge funding its operation, maintenance and making necessary improvements during that time. Moreover, any action against BNSF to quiet title or take possession of the bridge after such a long period of time of continued use and possession by the railroad would be barred by North Dakota law.

As stated above and set forth in more detail in the attached memorandum, FORB's argument is facially and legally absurd. It simply does not follow that upon North Dakota's admission to statehood, the railroad's ownership rights to the Bismarck Bridge, as conferred by the 1864 Act, were extinguished and

title to the Bismarck Bridge automatically passed to the State of North Dakota. Therefore, BNSF's urges the USCG to finalize the MOA and give consulting parties the opportunity to become signatories to or concur in that document. The USCG should conclude the NEPA process forthwith and issue a ROD approving the Right to Build permit for the BNSF Replacement Project.

Sincerely,



Mike Herzog, PE

Enclosure: Memorandum of counsel regarding ownership of the Bismarck Rail Bridge  
cc with encl:

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**TO:** United States Coast Guard, Office of Bridge Programs  
**FROM:** Jason A. Lien, Esq., Maslon LLP, ND Bar ID #09004  
**SUBJECT:** Ownership of BNSF Railroad Bridge in Bismarck, North Dakota  
**DATE:** March 11, 2022

## **INTRODUCTION**

BNSF Railway Company (“BNSF”) has retained Maslon LLP to investigate claims made by the Friends of the Rail Bridge (“FORB”) in a February 8, 2022 letter to the U.S. Coast Guard’s (“USCG”) Office of Bridge Programs regarding ownership of the 1883 railroad bridge crossing the Missouri River between Bismarck and Mandan, North Dakota (the “Bismarck Bridge”). In its letter and memorandum, FORB argues that the Bismarck Bridge is not a “privately owned resource” owned by BNSF, but rather is owned by the State of North Dakota. FORB’s February 8<sup>th</sup> submission makes the following assertions in support of its ownership argument: (1) in passing the 1864 Northern Pacific Railroad Land Grant, Congress “held in trust navigable waterways” and the underlying riverbeds for a future state; (2) the Bridge’s piers attach to the riverbed; (3) fixtures (*i.e.*, the piers and superstructure) are real property transferred with the land; and (4) upon achieving statehood, ownership of the Bismarck Bridge “was transferred to the State of North Dakota” pursuant to the Equal Footing and Public Trust Doctrines. FORB makes this claim of State ownership even though the State of North Dakota has made no similar claim with BNSF or filed documents with the USCG in support of FORB’s position. This memorandum contains the results of our research into this claim made by FORB.

## **EXECUTIVE SUMMARY**

BNSF is the title owner of the Bismarck Bridge. In 1864, Congress granted the right of way through public lands to the Northern Pacific Railroad Company (“Northern Pacific Railroad”), its ***successors and assigns***, to build and maintain a railroad, including all necessary “draws, culverts, [and] ***bridges***,” connecting Lake Superior to the Pacific Coast. Historical records confirm that the Bismarck Bridge was built by Northern Pacific Railroad. It was properly surveyed and recorded and there are patents issued pursuant to the original grant. Furthermore, it has been continuously operated by Northern Pacific Railroad’s successors up to and including BNSF. Federal case law holds that all railroad property located within the right of way used in constructing and operating the railroad, including bridges, becomes a part of the real estate of the railway company. Thus, BNSF, having properly perfected and maintained its ownership interest, holds title to the Bismarck Bridge.

FORB’s claims regarding the ordinary high water mark of the Missouri River and the Equal Footing and Public Trust Doctrines are irrelevant to and have no impact on BNSF’s ownership of the Bismarck Bridge. Notably, FORB cites ***no*** unpublished or published case law supporting its novel argument that the Missouri River’s status as a navigable waterway deprived

the railroad of its ownership of the Bismarck Bridge when the State of North Dakota achieved statehood on November 2, 1889. We have located no legal authority that validates this argument. On the other hand, both federal and state case law, including one federal decision that specifically mentions the Bismarck Bridge, holds that railroad bridges built over rivers are part of and owned by the railroad just the same as railroad bridges constructed on land.

## DISCUSSION

### **1. Congress Granted the Northern Pacific Railroad a Right of Way Through Public Lands and Empowered it to Construct Bridges Across Navigable Waterways as Necessary in Completing a Transcontinental Railroad Line.**

#### **A. The 1864 Land Grant Conveyed Title to the Right of Way at Issue to the Railroad.**

In 1864, Congress passed “An Act Granting Lands to aid in the Construction of a Railroad and Telegraph Line from Lake Superior to Puget’s Sound, on the Pacific Coast, by the Northern Route.” U.S. Statutes At Large, 38 Cong. Ch. 217, July 2, 1864, 13 Stat. 365, (the “1864 Act”). The first section of the 1864 Act incorporated the Northern Pacific Railroad, and empowered it to “construct and maintain a continuous railroad from a point on Lake Superior to some point on Puget sound.” *Northern Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 267 (1903).

Section 2 of the 1864 Act provided that “the right of way through the public lands be and the same is hereby granted to said ‘Northern Pacific Railroad Company,’ its successors and assigns, for the construction of a railroad and telegraph, as proposed . . . . Said way is granted to said railroad to the extent of 200 feet in width on each side of said railroad, where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables, and water stations.” *Id.* at 268.

Section 3 and 4 “created a large land grant to secure the construction and continuous maintenance of the road” with construction “supervised by commissioners appointed by the President” and provided a process for filing survey maps to definitely fix the location of the rail line. U.S. Statutes at Large, 38 Cong. Ch. 217, July 2, 1864, 13 Stat. 365.

Section 4 provided for a process by which a commission would examine the railroad as it was built, and, if approved, “patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands.” *Id.*

Section 5 of the 1864 Act provided “that said Northern Pacific Railroad shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations, and watering places, and all other appurtenances.” *Id.* (emphasis added).

Finally, Section 7 conferred the right of eminent domain on the railroad, providing that “Northern Pacific Railroad Company be, and is hereby, authorized and empowered to enter upon, purchase, take and hold any lands or premises that may be necessary and proper for the construction and working of said road . . . and also any lands or premises that may be necessary and proper for turnouts, standing places for cars, depots, station-houses, or any other structures required in the construction and working of said railroad.” *Id.* (emphasis added); *Townsend*, 190 U.S. at 268.

**B. Patents Issued to the Railroad Are Conclusive Evidence of Title to and Possession of the Land Granted and Compliance with Any Conditions of the Grant.**

The U.S. Supreme Court has held that under Section 3 of the 1864 Act, “the title to all lands within the terms of the grant, and not reserved from it at the time of the definite location of the grant, passed to the railroad company, and that no patent is necessary to invest the company with the title to such lands.” *Northern Pac. R.R. Co v. Walker*, 47 F. 681, 682–83 (C.C.N.D. 1891). The Supreme Court further explained that the provisions found in Section 4 of the 1864 Act, regarding the issuance of patents confirming the right and title to the lands granted, were not qualifications or conditions precedent to acquiring title but rather “would be evidence that, as to that portion of the road, the conditions of the grant had been complied with, and that it was thus freed from any liability to forfeiture for a disregard of them. They would also obviate the necessity of any further evidence of the grantee’s title.” *St. Paul & P.R. Co. v. Northern Pac. R.R. Co.*, 139 U.S. 1, at 6 (1891) (emphasis added).. In other words, the patents issued to the railroad company serve as “deeds of further assurance . . . giving quiet and peace to the grantee’s possession.” *Id.*

**C. The Railroad Filed Surveys Fixing the Definitive Location of Its Rail Line at the Missouri River Crossing and Was Issued Patents.**

On July 17, 1880, the Northern Pacific Railway Company certified that it mapped the definite location of the railroad line “from the Missouri River in the Territory of Dakota” to points west.<sup>1</sup> In 1882, a second map was prepared showing the as-constructed location of the Bismarck Bridge and includes a sworn statement of the chief engineer of the Northern Pacific dated November 28, 1882 stating that “said section has been completed and equipped as required by law, and that this line of route shows the correct location of said railroad.”

United States Bureau of Land Management records show that patents were issued to the Northern Pacific Railroad on January 17, 1896 under authority of the July 2, 1864 grant to Northern Pacific Railroad (13 Stat. 365) including the land on the east bank of the Missouri

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<sup>1</sup> This document and other digital records referenced in this memorandum are not attached due to their large size but can be made available upon request.

River and on May 23, 1896 under the authority of July 2, 1864 grant to Northern Pacific Railroad (13 Stat. 365) including the land located on the west bank of the Missouri River.

Northern Pacific Right of Way Plats further confirm the location of the bridge at Government Lots 1 & 2 E ½ NE ¼ of Section 31 in Township 139 North, Range 80 West of 5<sup>th</sup> Principal Meridian in Burleigh County on the East side of the Missouri river and at Government Lot 1 of Section 31 in Township 139 North, Range 80 West of the 5<sup>th</sup> Principal Meridian in Morton County, on the west side of the Missouri River.

Thus, having acquired patents to the section of rail line at the Missouri River crossing, BNSF has exclusive possession and title to the rail line, including the Bismarck Bridge, at this location. As described in greater detail below, the railroad company had authority from Congress to build the Bismarck Bridge and the river's status as a navigable waterway did not deprive the railroad of its possession.

**D. The 1864 Act of Congress Conferred Upon Northern Pacific Railroad a Right to Build and Maintain Bridges Across Navigable Waterways.**

Federal courts have determined that in chartering and authorizing railroad companies to build continuous railway lines, and investing them “with all the powers, privileges, and immunities necessary to carry into effect the purpose the acts,” Congress conferred upon the railway companies the right to build and maintain bridges across any navigable waters on their line so long as the bridge did not cause injury to or obstruction of the navigability of the waterway. *Hughes v. Northern Pac. Ry. Co.*, 18 F. 106, 114–15 (C.C.Or. 1883); *Union Pac. R.R. Co. v. Hall*, 91 U.S. 343 (1875).

In *Union Pacific Railroad Co. v. Hall*, customers of the Union Pacific Railway sought to enjoin the railroad company from treating the section of rail line from Omaha, Nebraska to Council Bluffs, Iowa as an independent and separate line, charging separate rates and causing freight and passengers to transfer at Omaha. 91 U.S. at 343–44. The question determined by the Court was whether the railroad bridge over the Missouri River between Omaha and Council Bluffs was a part of the Union Pacific Railroad, because, if it was, the railroad company was required by law to use it in connection with, and as a part of, their entire railroad, operating all parts together as a continuous line. *Id.*

In answering the question, the Supreme Court reviewed the Congressional Act of July 1, 1862 (12 St. 489), which simply provided for the construction of a line of railway by that company “from a point on the western boundary of the State of Iowa” to the 100th meridian west of Greenwich. *Id.* at 345. The Court stated:

From that act [July 1, 1862] alone we have deduced the conclusion that the company was authorized and required to build their railway to the Iowa shore. That authority included within itself power to build a bridge over the Missouri. No express grant to bridge the river was needed. Whatever bridges were necessary on

their line were as fully authorized as the line itself; and the company were as much empowered to build one across the Missouri as they were across the Platte, or any other river intersecting the line of their road.

*Id.* at 350.

In determining that the Union Pacific was obligated to operate the whole railway, including the bridge, as a single connected and continuous line, the Supreme Court concluded “**the bridge over the river, built by the railroad company, is a part of their railroad**, and required by law to be so operated . . . . The acts chartering the company manifest no intention to distinguish between the bridge over the Missouri River and other bridges on the line of their road. If it is not a part of their road, neither is any bridge between the Missouri and the western boundary of Nevada; for the power to build all bridges was given in the same words.” *Id.* at 352 (emphasis added).

In *Hughes v. Northern Pacific Railway Co.*, the Federal Circuit Court for the District of Oregon applied the reasoning in *Union Pacific Railroad Co. v. Hall* in determining whether Northern Pacific Railway had the right to build and maintain a bridge across a navigable waterway. *Compare* 18 F. 106 (C.C.Or. 1883) *with* 91 U.S. 343 (1875). In *Hughes*, Plaintiffs sought to enjoin the Northern Pacific from building a draw bridge across the Wallamet in Portland, Oregon arguing that the bridge would obstruct shipping and that the railroad company was not authorized by the State of Oregon or the United States to build the bridge. *Hughes*, 18 F. at 108.

Following *Hall*, the *Hughes* Court looked to the 1864 Act and its amendments to determine if the Northern Pacific had the right to build and maintain a bridge across the Wallamet. The court found that the Northern Pacific was authorized by the acts “to lay out, locate, construct, furnish, maintain, and enjoy a continuous railway,” with “all the powers, privileges, and immunities necessary to carry into effect the purpose” of said acts; with the railway “to be constructed in a substantial and workman-like manner, with all the necessary draws... bridges,” etc., and, therefore, Congress impliedly authorized the construction of the proposed bridge over the Wallamet. *Id.* at 107–16. The court noted that its conclusion was directly supported by the authority of the Supreme Court’s decision in *Hall* where “the question of [the railroad’s] power under an act similar to the charter of the Northern Pacific, to bridge a navigable water in the line of its road, was squarely presented to the court and unqualifiedly decided in the affirmative.” *Id.* at 117.

Contrary to FORB’s argument, under *Hall* and *Hughes*, Congress conferred the right to Northern Pacific Railroad to build and maintain the Bismarck Bridge and recognized it as part of its railroad. The only qualification imposed, as stated in *Hughes*, was that the bridge not impede the navigability of the Missouri River—which it did not. **Indeed, the Hughes Court specifically references the Bismarck Bridge in its decision:** “It is said, and the fact is admitted, that [the Northern Pacific Railroad] has already constructed a bridge, without question, across the



Missouri river at Bismarck, under the authority of its charter. But that is understood to be a high bridge, that in no way impairs the navigability of the stream.” *Id.* at 113.

Additional federal case law supports BNSF’s ownership. In *Northern Pacific Railroad Co. v. Walker*, the Circuit Court for North Dakota held that “‘railroad property’ is commonly understood to mean the property which is essential to a railroad company to enable it to discharge its functions and duties as a common carrier by rail. It includes the road-bed, right of way, tracks, **bridges**, stations, rolling-stock, and such like property.” 47 F. 681, 685 (C.C.N.D. 1891) (emphasis added). In *Northern Pacific Railroad Co. v. Carland*, the Supreme Court for the Territory of Montana, discussing the exemption of Northern Pacific’s right of way from taxation, stated that the railroad’s title to the right of way “is vested and exclusive. It is an easement in the land described in the right of way. It is a freehold interest in the soil, having all the properties of realty . . . . Within the boundaries of the right of way, as described in the grant, personal property used in constructing and operating the road, attached to the soil and annexed to the easement, becomes a part of the real estate of the company.” 3 P. 134, 138–39 (Mont. Terr. 1884).

**E. BNSF Has Maintained its Ownership Interest in the Bismarck Bridge Through Its Continued Use of the Structure.**

The right-of-way grant made by the 1864 Act has consistently been described as a limited fee upon an implied condition of reverter. *See Townsend*, 190 U. S. at 271; *E. A. Crandall*, 43 L. D. 556, 557 (Pub. Lands Dec. 1915); *Melder v. White*, 28 L. D. 412, 418 (Pub. Lands. Dec. 1899); *Great N. Ry. Co. v. United States*, 315 U. S. 262, 273, fn. 6 (1942).

The purpose for which the grant to the Northern Pacific Railroad was made is stated in *Townsend*:

The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right-of-way. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted.

*Townsend*, 190 U.S. at 271.

With respect to any conflicting claims of ownership as between the railroad claiming ownership under the 1864 Act and another party claiming ownership under state law, there have been a number of federal district court cases wherein a private citizen claimed an interest by adverse possession or under the homestead acts to land conveyed to the railroad by the 1864 Act. *Id.* at 267; *Rice v. U.S.*, 348 F.Supp. 254, 255 (D.N.D. 1972). In these cases, the courts held that the interest conveyed by the 1864 Act were not subject to dispossession under state law.

In *Townsend*, homesteaders occupied and cultivated land up to the ordinary and snow fences of the Northern Pacific Railway's rail bed (within the railroad's 200 foot right of way). *Townsend*, 190 U.S. at 269. The court noted that the railroad had perfected its interest in the right of way as required under the provisions of the Act. *Id.* The homesteaders occupied the land for the sufficient length of time required by Minnesota law to constitute title by adverse possession. *Id.* The railroad brought an action for ejectment in Minnesota state court and, following a bench trial, the court found in favor of the railroad. *Id.* The Minnesota Supreme Court reversed the decision, finding in favor of the homesteaders and the case was appealed to the U.S. Supreme Court. *Id.*

The Court found in favor of the railroad, stating that

[T]he courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the states for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states, **subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee.**

*Id.* at 270–71 (emphasis added). In other words, the Court found that state law could not be used to dispossess the railroad of land conveyed to it by Congress through the 1864 Act.

The Court stated further that Congress “plainly manifested its intention that the title to, and possession of, the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained.” *Id.* at 272.

This is precisely the case here. BNSF is the successor in interest to the Northern Pacific Railroad.<sup>2</sup> BNSF operations and rail traffic continues on the Bismarck Bridge and BNSF and its predecessors in interest have kept the bridge in repair and operating order since its completion in the early 1880s. Thus, BNSF and its predecessors have maintained continuous title and possession of the Bismarck Bridge.

## **2. Northern Pacific Railroad's Interest in the Bismarck Bridge Was Not Subject to the 1890 Forfeiture Act.**

In its memorandum, FORB argues that any ownership that Northern Pacific had in “State-owned interest in real property” under the 1864 Act was forfeited under the general forfeiture provisions of an 1890 law. (*See* FORB Mem. at 6). FORB is mistaken.

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<sup>2</sup> *See The History of BNSF: A Legacy for the 21<sup>st</sup> Century*, BNSF RAILWAY, available at: <https://www.bnsf.com/about-bnsf/our-railroad/overview/index.html>.

The statute FORB cites provides, in pertinent part:

There is forfeited to the United States, and the United States resumes the title thereto, all lands granted prior to September 29, 1890, to any State or to any corporation to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad ***not on that date completed, and in operation***, for the construction or benefit of which such lands were granted; and all such lands are declared to be a part of the public domain: Provided, That sections 904 to 907 of this title ***shall not be construed as forfeiting the right-of-way or station grounds of any railroad company granted prior to September 29, 1890.***

43 U.S.C. § 904 (emphasis added).

Importantly, the forfeiture provisions contain two critical exceptions: (1) the Act has no effect on any grant for any line completed and in operation; and (2) the Act does not apply to the grant of the railroad right of way itself. Here, both exceptions apply to the Bismarck Bridge. As FORB concedes, the Bismarck Bridge was complete and operational by 1883 and the bridge is part of the railroad's right of way. Thus, 1890 forfeiture act had no effect on the railroad's title to the Bismarck Bridge. In addition, the 1890 law expressly states that "No lands declared forfeited to the United States by sections 904 to 907 of this title shall by reason of such forfeiture inure to the benefit of any State." 43 U.S.C. § 907. Accordingly, even if the railroad's title to the Bismarck Bridge were forfeited under the act, title would not have passed to North Dakota, as argued by FORB.

In addition, any argument by FORB that Northern Pacific's interest in the Bismarck Bridge reverted to the grantor due any alleged failure of the railroad to complete its line in the time allowed by Congress is also without merit. Land granted to a railroad company does not "*ipso facto* revert to the United States by mere failure to build the road within the period prescribed by Congress [in the grant; but,] to effect a forfeiture some act on the part of the government evincing an intention to take advantage of such failure is essential." *U.S. v. Northern Pac. Ry. Co.*, 177 U.S. 435, 439–40 (1900). Here, no action has been taken, either by legislative or judicial proceedings, to enforce a forfeiture of the estate granted by the 1864 Act. Thus, BNSF's title remains as it existed on the day the location of the route of the railroad acquired precision.

### **3. Title to the Bismarck Bridge Did Not Pass to the State of North Dakota Upon its Admission to Statehood.**

FORB further claims that title to the Bismarck Bridge passed from the Northern Pacific to North Dakota when it became a state in 1889 because, in short, the bridge's piers attach to the bed of the Missouri River and, the Missouri being a navigable waterway, North Dakota gained title to the Missouri's riverbed under the Equal Footing and Public Trust Doctrines. In arguing its position, FORB misstates the Equal Footing Doctrine, claiming that the only exception to it is

where a grant of the submerged land is made by a foreign law before such lands are ceded to the United States. *See* FORB Mem. at 2–3. This statement is incorrect.

First, in all circumstances, “the United States retains a navigational easement in the navigable waters lying within [its borders] for the benefit of the public, regardless of who owns the riverbed.” *Montana v. United States*, 450 U.S. 544, 555 (1981). Thus, upon achieving statehood, states do not take absolute title free of any encumbrance as implied by FORB.

Second, it is well established that Congress may convey lands below the high-water mark of a navigable waterway in order to “effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory.” *Id.* at 551; *Idaho v. United States*, 533 U.S. 262, 273 (2001); *United States v. Alaska*, 521 U.S. 1, 33–34 (1997) (holding that Congress can reserve submerged lands under federal control for an appropriate public purpose); *United States v. City of Anchorage, Alaska*, 437 F.2d 1081 (9th Cir. 1971) (holding that title to tidal and submerged lands adjacent to federally owned and operated railroad line and terminal remained in United States after Alaska was admitted as a state).

Finally, even where title to the beds of the rivers lies in the state, it is subject to the power of Congress to use the lands under the streams “for any structure which the interest of navigation, in its judgment, may require.” *Pike Rapids Power Co. v. Minneapolis, St. P. & S.S.M.R. Co.*, 99 F.2d 902, 910 (8th Cir. 1938) (*citing Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82 (1913)).

There does not appear to have been any acquisition by the United States of title to those lands, unless, as respondent urges, the occupation of the beds for the purpose of the improvements constituted an acquisition of title. But as the occupation was simply the exercise of the dominant right of the federal government the servient title continued as before. No transfer of the title appears.

*Id.* at 910.

In light of the foregoing case law, it is not surprising that FORB fails to cite any cases or other legal authority wherein a state or other governmental body claimed ownership of a railroad bridge by virtue of its attachment to the bed of a navigable waterway. We have also been unable to locate any legal authority that supports this position.

#### **4. Any Action to Divest BNSF of Title to the Bismarck Bridge Would Be Barred By the Equitable Defense of Laches.**

Finally, over 132 years have passed since North Dakota achieved statehood in 1889, when, as argued by FORB, North Dakota would have taken title to the Bismarck Bridge. BNSF and its predecessors have continuously operated the Bismarck Bridge funding its operation, maintenance and making necessary improvements during that time. If an action were brought

against BNSF to quiet title or take possession of the bridge, such action would be barred by the equitable defense of laches. *Stenehjem ex rel. State v. National Audubon Society, Inc.*, 844 N.W.2d 892, 901 (N.D. 2014).

In *Stenehjem*, the Attorney General on behalf of the State of North Dakota (“State”) brought a divestiture action against the National Audubon Society (“NAS”) in 2009 seeking to force the sale of the non-profit corporation’s 263-acre parcel of land under the State’s Corporate Farming law. *Id.* at 896. The NAS acquired the parcel of land in 1988 and made substantial conservation improvements to it. *Id.* In its defense, the NAS asserted the equitable defense of laches—a delay or lapse of time in commencing an action that works a disadvantage or prejudice to the adverse party because of a change in conditions during the delay. *Id.* at 899. The State argued laches could not be invoked in a sovereign governmental enforcement action. *Id.* The Supreme Court of North Dakota first held that the equitable defense of laches against the State is not barred as a matter of law in a sovereign governmental enforcement action. *Id.* at 900–01. The Court further held that, in this circumstance, the defense of laches barred State’s divestiture action against NAS because over 20 years had passed since NAS has acquired the land, it had continuously paid its tax assessments and had “practiced weed control, managed the property and re-seeded 49 acres. Audubon has also enhanced and restored the wetlands.” *Id.* at 904. Thus, the Court determined, laches appropriately barred the State’s action because the 20 year delay by the State in bringing its claim would work a substantial prejudice upon the NAS. *Id.*

Considering that the North Dakota Supreme Court found that a 20 year delay by the State in bringing an action was barred by laches where the property owner controlled weed growth, reseeded a portion of the property and restored a portion of wetlands. *Id.* A court is all but certain to find that a 132 year delay in bringing an action to take possession of the Bismarck Bridge is likewise barred by laches where BNSF has continuously operated the bridge, making significant investments in ongoing maintenance and necessary improvements during that time.<sup>3</sup>

### CONCLUSION

In conclusion, FORB’s argument is facially absurd. It simply does not follow that upon North Dakota’s admission to statehood, the railroad’s ownership rights to the Bismarck Bridge, as conferred by the 1864 Act, were extinguished and title to the Bridge automatically passed to the State of North Dakota. If FORB’s interpretation of the law were correct the ownership of dozens or perhaps hundreds of railroad bridges built over rivers in territories before statehood would be thrown into doubt. Accordingly, FORB’s argument should be summarily rejected.

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<sup>3</sup> In addition to the equitable defense of laches, actions to quiet title are subject to a 20 year statute of limitations under N.D.C.C. § 28-01-04. *Haas v. Bursinger*, 470 N.W.2d 222, 223 (N.D. 1991).