



## FORB – Friends of the Rail Bridge

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### Memorandum

To: The United States Coast Guard (USCG)  
From: Friends of the Rail Bridge (FORB) and FORB's In-House General Counsel and Board Member, Lyle Witham, North Dakota Bar ID # 04118  
Re: Law and Evidence relating to Ownership of the 1883 Northern Pacific Railway Bridge  
Date: April 4, 2022

#### **1.0 Introduction: Background History for the Location of the Historic Bridge, as well as for the Equal Footing Doctrine and U.S. Const. Article IV, Section 3, Clause 1.**

On March 11, 2022, Burlington Northern Santa Fe railroad (BNSF), the permit applicant and project proponent for replacement of the historic rail bridge between Bismarck and Mandan, North Dakota, under the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA), sent its response to FORB's February 8, 2022, memorandum and follow up letters. BNSF's response set forth the facts and legal arguments supporting FORB's position that the State and people of North Dakota own the historic 1883 Northern Pacific Railway Bridge, rather than BNSF. As FORB expected, BNSF responded with a memorandum that essentially is an initial trial brief citing various statutes and case law. Worse, BNSF's memorandum ignores and fails to address the controlling black letter law<sup>1</sup> that governs the outcome of this case, the Equal Footing and Public Trust Doctrines. FORB raised and cited these fundamental doctrines in its memorandum and follow up letters. FORB also cited and discussed the 1864 Northern Pacific Railway Act creating the Northern Pacific Railroad that BNSF solely relies on in its memo as its evidence of ownership. Between those two – the Equal Footing and Public Trust Doctrines versus the 1864 Act – the Equal Footing Doctrine is clearly the controlling law for the issues FORB has raised in this case for the reasons discussed below.

The Equal Footing Doctrine was established black letter law for decades prior to the 1864 Act that created the Northern Pacific. The proponents of the 1864 Act ignored the Equal Footing Doctrine at their peril when they approached Congress and secured passage of the Bill at a harrowing point in the Civil War without addressing the issue of ownership of the riverbeds the railroad right-of-way would cross. The Northern Pacific ignored it again when they surveyed the crossing at the Missouri River and all other river crossings on navigable rivers in Dakota Territory further west (under the protection of Lt. Colonel George A. Custer and the U.S. Army troops stationed at Fort Lincoln) without addressing the issue of ownership of the riverbeds that

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<sup>1</sup> Black letter laws are the well-established legal rules no longer subject to reasonable dispute.

the railroad right-of-way would cross. Then once again Northern Pacific ignored ownership of the riverbed when they constructed the 1883 Northern Pacific Railway Bridge (a/k/a Historic Bridge) between Bismarck and Mandan without first establishing that the railroad owned the Historic Bridge on a riverbed whose ownership was reserved to a future state under the Public Trust and Equal Footing Doctrines. Now BNSF ignores it at their peril by attempting to destroy the historic 1883 Northern Pacific Railway Bridge as its own personal property, rather than having to comply with and pay for the costs to “avoid, minimize, and mitigate” the impacts of the proposed project on the Historic Bridge, as required of the project proponent under NHPA and its implementing regulations.

BNSF has attempted to get a permit to destroy the Historic Bridge without submitting evidence into the NHPA or NEPA administrative record that BNSF owns it. Ownership of the historic property in question is always the first and most fundamental question to be addressed in any federal action (in this case getting a permit from USCG) that proposes to impact a historic property of national significance under the National Register of Historic Places, such as the 1883 Northern Pacific Railway Bridge. BNSF is responsible for any delay caused by BNSF’s fundamental failure to address ownership of the Historic Bridge at the beginning of BNSF’s permit application process with USCG, not FORB.

To understand why the Equal Footing and related Public Trust Doctrines are the controlling law in this case, it is first necessary to discuss in detail the history and background that makes those doctrines the controlling black letter law, as well as the history of the occupation and ownership of the river crossing where the Historic Bridge is located.

The underlying principle is this: “Equality of constitutional right and power is the condition of all the States of the Union, old and new.”<sup>2</sup> Prior to the Constitutional Convention in 1787, several States already had ceded to the United States their overlapping and disputed western territories to the United States as shown on the map below. Georgia and Virginia ceded their western territories upon the condition that new states be formed from all this land and admitted to the Union on an “equal footing” with the original states.<sup>3</sup> Based in part on that understanding, the language of U.S. Const. Article IV, Section 3, Clause 1, was included in the Constitution:

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

Before the Constitutional Convention in 1787 in Philadelphia but after the Revolutionary War had ended September 3, 1783, (when Britain accepted American independence in the Treaty of Paris), the Continental Congress had tried to figure out how to organize the federal union that was to become the United States. A significant obstacle to forming that union was that lands west of the original 13 States were held by only seven of the states, Massachusetts, Connecticut, New York, Virginia, North and South Carolina, and Georgia (Figure 1).<sup>4</sup>

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<sup>2</sup> *Escanaba Co. v. City of Chicago*, 107 U.S. 678, 689 (1883).

<sup>3</sup> See *Pollard v. Hagan*, 44 U.S. (3. How.) 212, 221 (1845).

<sup>4</sup> See 17 Journals of the Continental Congress, 806-08 (Sept. 1780) (Gaillard Hunt ed. 1910); C. Perry Patterson, *The Relation of the Federal Government to the Territories and the States in Landholding*, 28 Tex. L. Rev. 43, 46 (1949);

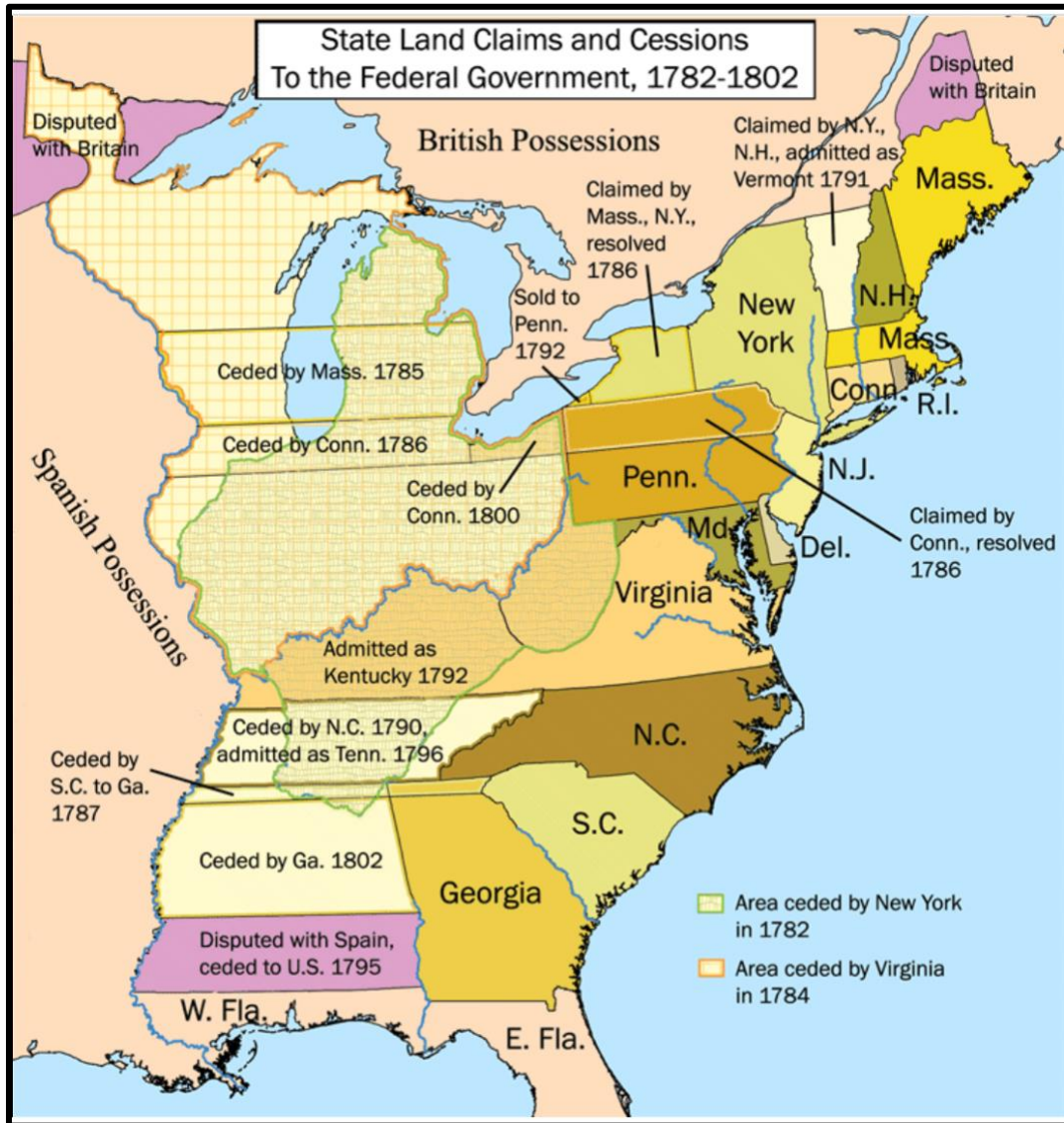


Figure 1: State Land Claims and Concessions to the U.S. Federal Government, 1782-1802.

Led by Maryland, the non-landholding states argued that the original 13 states all had made enormous sacrifices to liberate the western territories and thus the whole of those territories should be ceded to the United States for the common benefit of all.<sup>5</sup> Following Maryland's example, New Jersey refused to ratify the Articles of Confederation until the Western territories

Eugene R. Gaetke, *Refuting the "Classic Property Clause" Theory*, 63 N.C. L. Rev. 617, 624 (1985); John Hanna, *Equal Footing in the Admission of States*, 3 Baylor L. Rev. 519 (1951); and Paul W. Gates, *History of Public Land Law Development* p. 49 (Written for the Public Land Law Review Commission, Washington Government Printing Office 1968).

<sup>5</sup> 14 Journals of the Continental Congress 621 (May 1779) (Worthington Chauncy Ford ed. 1909) (arguing that the western territories were "wrested from the common enemy by the blood and treasure of the thirteen states [and] should be considered as common property"). See also 17 Journals of the Continental Congress, 806-08 (Sept., 1780) (Gaillard Hunt ed. 1910).

were recognized as the property of the confederation.<sup>6</sup> This issue was raised before the Continental Congress in response to the concern that if the western territories held by the seven states were redistributed among all the states, and all the states together allowed private landholding companies to buy, sell, and redistribute that land, the individuals and land holding companies who redistributed the land stood to make huge profits.<sup>7</sup>

As the primary target of Maryland and New Jersey's complaints, Virginia responded that the complaints were the result of more cynical motives. The legislatures of Maryland and New Jersey were both heavily influenced by prominent individuals who had invested in land companies and speculative land ventures. Something similar to this would happen in Dakota Territory under the unprincipled and sometimes corrupt influence of the Northern Pacific when North Dakota became a State.<sup>8</sup>

After considering the issue, the Continental Congress recommended to the legislatures of the seven western landholding States that those seven States each pass legislation to “cede their western territories to the confederation.”<sup>9</sup> All seven States eventually did so. Figure 1 shows where these lands were, and when they were ceded to the United States.

Thomas Jefferson played an instrumental role in the Continental Congress in moving these debates between the original 13 States from the discussion stage to passage of one of the most important statutory laws enacted by the Continental Congress.<sup>10</sup> Jefferson headed up the congressional committee within the Continental Congress that was established to develop the form of territorial government and the conditions under which a territory was to become a state.<sup>11</sup>

The first use of the term “equal footing” was in the Ordinance of 1784, which states that “whenever any of the said states shall have, of free inhabitants as many as then shall be in any one the least numerous of the thirteen original States, such State shall be admitted by its Delegates into the Congress of the United States, on an equal footing with the said original States.” That number was changed to 60,000 free inhabitants in the Northwest Ordinance enacted by the Continental Congress in 1787<sup>12</sup> (at approximately the same time that the U.S. Constitution was being drafted in Philadelphia while Jefferson was away in France).

Upon recommendation of the committee that had drafted it (first led by Jefferson in 1784), the Continental Congress enacted the Northwest Ordinance on July 13, 1787; the Northwest Ordinance provided that when each of the designated states in the territorial area west of the

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<sup>6</sup> 11 Journals of the Continental Congress 650 (June 1778) (Worthington Chauncy Ford ed. 1908) (“It was ever the confident expectation of this State [New Jersey], that the benefits derived from a successful contest, were to be general and proportionate; and that the property of the common enemy, falling in consequence of a prosperous issue of war, would belong to the United States, and would be appropriated to their use.”).

<sup>7</sup> See Paul W. Gates, *supra*, footnote 3, at pp. 50-51.

<sup>8</sup> See the law review by former North Dakota Supreme Court Justice Robert Vogel, *Sources of the 1889 North Dakota Constitution*, 65 N.D. Law Rev. 331 (1989); Derrick Jensen and George Draffan, *Railroads and Clearcuts: Legacy of Congress’s 1864 Northern Pacific Land Grant*, (Inland Empire Public Lands Council 1995).

<sup>9</sup> 17 Journals of the Continental Congress 807 (Sept. 1780) (Gaillard Hunt ed. 1910); Gates, *supra*, footnotes 3-4, at p. 51.

<sup>10</sup> 26 Journals of the Continental Congress 113, 118 (March 1784) (Gaillard Hunt ed. 1928)..

<sup>11</sup> 26 Journals of the Continental Congress, *supra*, at 113, 118.

<sup>12</sup> 26 Journals of the Continental Congress, *supra*, at 113, 118.

original 13 States achieved a population of 60,000 free inhabitants it was to be admitted “on an equal footing with the original States, in all respects whatever.”<sup>13</sup> The Northwest Ordinance addressed the land north of the Ohio River and west of Pennsylvania, then called the Northwest Territory, which was a large and ill-defined territory ceded by Great Britain to the U.S. at the end of the Revolutionary War, and which in turn later became all or part of the States of Ohio, Indiana, Illinois, Michigan, Wisconsin, and Minnesota as shown on the map below (Figure 2).<sup>14</sup>



Figure 2: The 1787 Boundaries of the Northwest Territory.

The Northwest Ordinance is the first time that the language “equal footing,” after which the Equal Footing Doctrine is named, was used and enacted into a federal law. And, because it was enacted while the Constitution also was being drafted in 1787 to replace the Articles of Confederation, the “equal footing” language of the Northwest Ordinance was the law and understanding that the Framers had when they included in the Constitution the article that governs how new States are admitted to the Union – U.S. Const. Article IV, Section 3, Clause 1.

The members of the Constitutional Convention, sometimes referred to as “the Framers,” signed the final draft of the Constitution in Philadelphia on September 17, 1787, two months and four days after the Northwest Ordinance was enacted by the Continental Congress. This issue – how new States from the western territories under the still-being-drafted Constitution were to be admitted to the Union – was an instrumental step, perhaps the instrumental step, that allowed the Framers to reach agreement and sign the Constitution. Admission of new States, including

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<sup>13</sup> An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio, Art. V, 5 Journals of Congress 752–754 (1823 ed.), reprinted in C. Tansill ed., Documents Illustrative of the Formation of the Union of the American States, H. Doc. No. 398, 69th Cong., 1st Sess. (1927), 47, 54.

<sup>14</sup> See Wikipedia maps at [https://en.wikipedia.org/wiki/Historic\\_regions\\_of\\_the\\_United\\_States#Former\\_organized\\_territories](https://en.wikipedia.org/wiki/Historic_regions_of_the_United_States#Former_organized_territories) (March 18, 2022).



whether new States would be “slave states” or “free States,” was an issue of contentious debate dividing not only the Continental Congress and the Constitutional Convention, but also the nation. When the Continental Congress enacted the Northwest Ordinance in City Hall in New York on July 13, 1787, they achieved one of the necessary steps that allowed the Framers to reach agreement on the final draft of the Constitution signed in Philadelphia in September 1787.

The Civil War would be fought later to address the underlying issues that the Constitution left unresolved, slavery and the meaning of the Supremacy Clause of the Constitution being chief among them. During the Civil War, the southern slave States and their Senators that previously blocked passage of the laws that would open settlement of the western territories of the United States were no longer part of Congress. That allowed Congress to enact three of the laws most important to settlement of the western United States:

- 1) the Homestead Act of 1862;<sup>15</sup>
- 2) the Pacific Railway Act of 1862<sup>16</sup> that allowed construction of the first transcontinental railroad and telegraph between Omaha, Nebraska, and Sacramento, California, from 1862-69; and
- 3) the 1864 Act<sup>17</sup> that created the Northern Pacific and allowed construction of the second transcontinental railroad between Duluth, Minnesota, and two ports near present day Seattle, Washington and Portland, Oregon. It was supposed to be completed from 1864-1872 but was not completed until 1883 (with completion of the 1883 Northern Pacific Railway Bridge between Bismarck and Mandan as one of its final major steps).<sup>18</sup>

### **1.1 Equal Footing Doctrine as applied to Lands included in the Louisiana Purchase in 1803**

When Tennessee was admitted to the union in 1796, Congress included in the Act admitting Tennessee, under U.S. Const. Article IV, Section 3, Clause 1, the same “equal footing” language used in every instance since then when admitting a new State to the Union, including North Dakota. The Equal Footing Clause does exactly what it says: it admits each State into the Union on “equal footing.” The language of the Equal Footing Clause used for Tennessee and for each new State admitted to the Union after that defines each State’s relationship to the federal government and to all other States. The Equal Footing Clause provides that each new State enters the Union “*on an equal footing with the original States in all respects whatever.*”<sup>19</sup>

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<sup>15</sup> Act of May 20, 1862 (Homestead Act), Public Law 37-64 (12 STAT 392); 5/20/1862; Enrolled Acts and Resolutions of Congress, 1789 – 2011. See footnote 14 above.

<sup>16</sup> Act of July 1, 1862 (Pacific Railroad Act), 12 STAT 489, which established the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean.; 7/1/1862; Enrolled Acts and Resolutions of Congress, 1789 – 2011.

<sup>17</sup> Act of July 2, 1864 (13 Stat. at L. 365, chap. 217) referred to throughout this memorandum as the 1864 Act.

<sup>18</sup> A chapter of Eugene V. Smalley’s *History of the Northern Pacific Railroad*, published in 1883, supra, footnote 4, is almost entirely devoted to the construction of the historic Northern Pacific Railway Bridge between Bismarck and Mandan at issue in this case as the final major step in completing the second transcontinental railroad across the United States in 1883, eleven years past the statutory deadline set by the 1864 Act. See Smalley, supra, Chapter XLIII, pp. 388-97.

<sup>19</sup> 1 Stat. 491 (1796). Prior to Tennessee's admission, Vermont and Kentucky were admitted with different but conceptually similar terminology. 1 Stat. 191 (1791); 1 Stat. 189 (1791).

With admission of Louisiana to the Union in 1812, the Equal Footing Clause – “on an equal footing with the original States in all respects whatever”<sup>20</sup> – first extended equal footing and status to a State created out of territory purchased under treaty from a foreign power rather than land ceded from one of the original 13 States. In Louisiana’s case, *as in the part of North Dakota where the Historic Bridge is located*, this territory was purchased by treaty from France through the signing of the Louisiana Purchase Treaty on April 30, 1803.<sup>21</sup> Admission of Louisiana as a State for the benefit of the “inhabitants of the ceded territory” was one of the requirements of the Louisiana Purchase Treaty. Article III of the Louisiana Purchase Treaty provides:

The inhabitants of the ceded territory shall be incorporated in the Union of the United States and admitted as soon as possible according to the principles of the federal Constitution to the enjoyment of all these rights, advantages and immunities of citizens of the United States, and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property and the Religion which they profess.

When Louisiana became a State in 1812, the inhabitants of European descent were given the full “advantages and immunities of citizens of the United States” as required by Article III of the 1803 Treaty. Prior to that, in 1804, all the Louisiana Purchase south of the 33<sup>rd</sup> parallel became the “Territory of Orleans,” which in turn became the State of Louisiana in 1812. The remainder of the Louisiana Purchase territory became the District of Louisiana, which was essentially all the drainage basin of the Mississippi and Missouri Rivers west of the Mississippi River. The District of Louisiana was later renamed the Territory of Louisiana, and in 1812 when the Territory of Orleans became the State of Louisiana, the Territory of Louisiana was renamed the Missouri Territory (Figure 3).

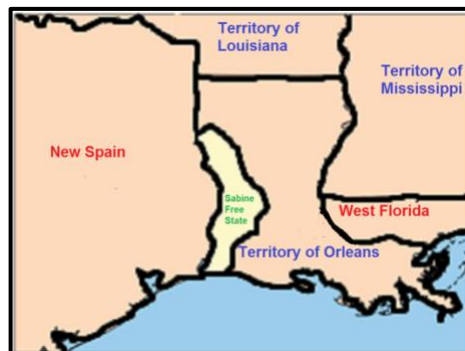


Figure 3: Map of Territories in the Louisiana Purchase, 1804-1812 (taken from Wikipedia)

The “inhabitants of the ceded territory” referred to in the Louisiana Purchase Treaty included not only the inhabitants of European descent who were to be given the full “advantages and immunities of citizens of the United States” when Louisiana was admitted to the Union in 1812, but also the people in the tribal nations that are described in Article VI of the Louisiana Purchase Treaty:

The United States promise to execute Such treaties and articles as may have been agreed between Spain and the tribes and nations of Indians until by mutual consent of the United States and the said tribes or nations other Suitable articles Shall have been agreed upon.

<sup>20</sup> 2 Stat. 701, 703 (1812).

<sup>21</sup> The Louisiana Purchase Treaty of 1803 is available online through the National Archives at <https://www.archives.gov/milestone-documents/louisiana-purchase-treaty#:~:text=In%20this%20transaction%20with%20France,Mississippi%20River%20for%20%202415%20m>.

The peoples of the tribal nations that were “inhabitants of the ceded territory” that first became the “Territory of Louisiana” and then “Missouri Territory” did not obtain the “advantages and immunities of citizens of the United States” required by Article III of the Louisiana Purchase Treaty for another 121 years, when, under the Snyder Act of 1924,<sup>22</sup> Native Americans born in the United States were finally given full U.S. citizenship, including the right to vote. Although the Fifteenth Amendment, passed in 1870, granted all U.S. citizens the right to vote regardless of race, it wasn't until the Snyder Act that Native Americans began to enjoy the rights granted by the Fifteenth Amendment as well as Article VI of the Louisiana Purchase Treaty, which had required that the “inhabitants of the ceded territory” receive full “advantages and immunities of citizens of the United States” in 1803.

### **1.2 Summary of the Historical Background and Maps that Connect the Fort Laramie Treaty of 1851 to the 1883 Northern Pacific Railway Bridge Crossing Site, and How, as a Senate Ratified Treaty, the 1851 Treaty is a Congressional Act that precedes the 1864 Act in Time and Right**

It took less time, 48 years from 1803 to 1851, for the United States to fulfill Article VI of the 1803 Louisiana Purchase Treaty's “promise to execute Such treaties and articles as may have been agreed between Spain and the tribes and nations of Indians until by mutual consent of the United States and the said tribes or nations other Suitable articles Shall have been agreed upon,” for the tribal nations of the upper Missouri Territory west of the Missouri River. “Early in 1851, the Congress of the United States authorized holding a great treaty council with Plains Indians to assure peaceful relations along the Overland Trails. Fort Laramie was chosen as the meeting place and various Indian tribes were invited to come by September 1st. More than 10,000 Plains Indians (men, women and children) gathered to sign the treaty causing the location to move to Horse Creek since Fort Laramie could not accommodate the crowd.”<sup>23</sup> The Fort Laramie Treaty of 1851 was signed on September 17, 1851, between the United States treaty commissioners and representatives among the 10,000 from the Cheyenne, Lakota Sioux, Arapaho, Crow, Assiniboine, Mandan, Hidatsa, and Arikara Nations and set forth the territories allocated to each of these tribal nations.<sup>24</sup>

Article 5 of the 1851 Treaty<sup>25</sup> describes by metes and bounds the whole of areas 529 and 620, and the part of area 621 south of the Missouri River as shown on Figure 4. Article 5 also reserves to all tribal nation signatories to the treaty: “the aforesaid Indian nations do not hereby abandon or prejudice any rights or claims they may have to other lands; and further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore

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<sup>22</sup> Act of June 2, 1924, Public Law 68-175, 43 STAT 253, which authorized the Secretary of the Interior to issue certificates of citizenship to Native Americans.

<sup>23</sup> See National Park Service website, <https://www.nps.gov/articles/000/horse-creek-treaty.htm>

<sup>24</sup> *Report to The President By The Indian Peace Commission*, ¶ 69, (January 7, 1868).

<sup>25</sup> Available online at <https://indianlaw.mt.gov/docs/fortpeck/treaties/laramie-treaty-1851.pdf>



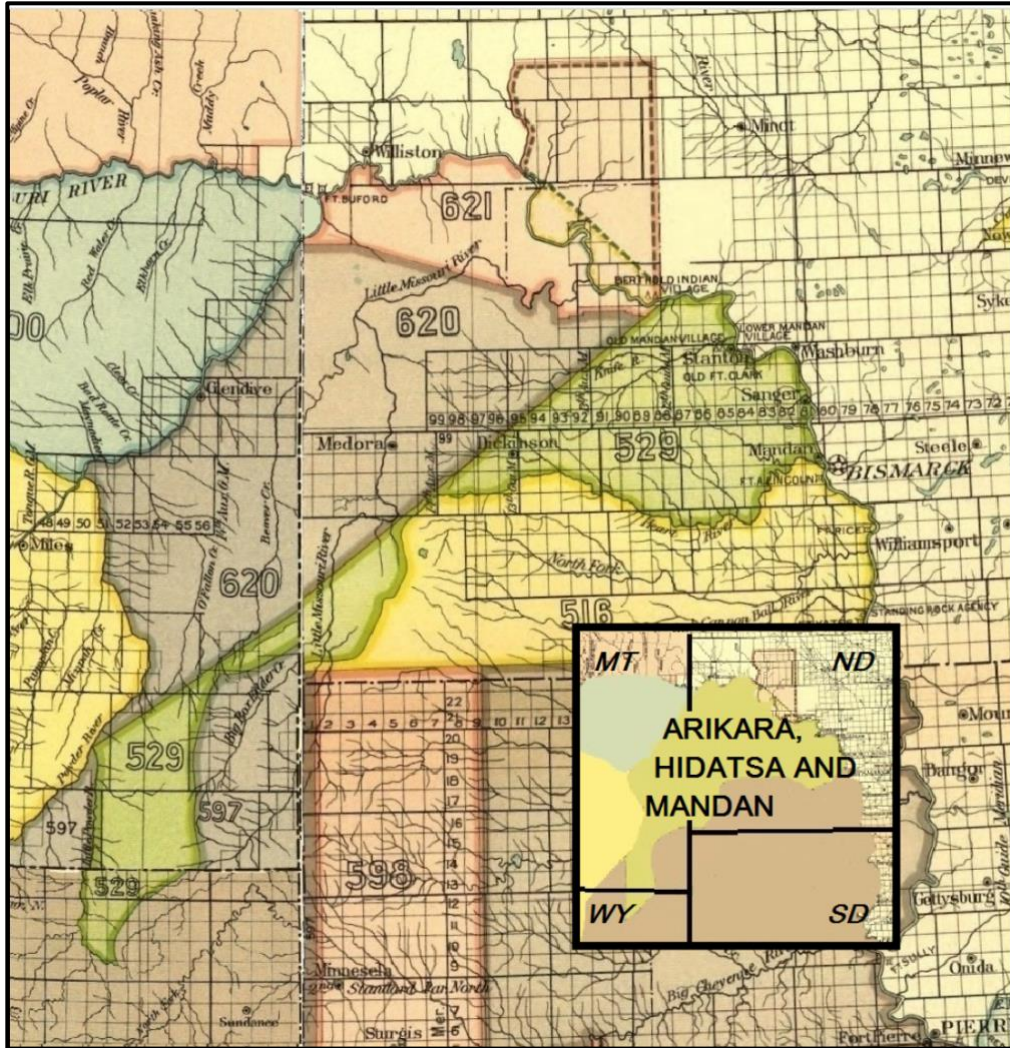


Figure 4: 1851 Fort Larimer Treaty Areas 529, 620, and 621 Allocated to the Mandan, Hidatsa, and Arikara Tribes.

described.” In 2019, *Herrera v. Wyoming*,<sup>26</sup> held that off-reservation treaty hunting rights remain intact even after diminishment of a reservation and statehood under the 1868 Fort Laramie Treaty, a different Treaty than the 1851 Treaty that involved only the Lakota Sioux and Crow tribal nations. This raises the question of what else is preserved under the language of Article 5 of the 1851 Treaty that uses similar language to the language at issue in *Herrera v. Wyoming*. Section IA of the Court’s opinion in *Herrera v. Wyoming* provides an excellent summary of the relevant background history, which is identical in many respects to the history for the Mandan, Hidatsa, and Arikara tribal nations as it relates to the 1851 and 1868 Laramie Treaties, so it is quoted in its entirety below.

The Crow Tribe first inhabited modern-day Montana more than three centuries ago. *Montana v. United States*, 450 U. S. 544, 547 (1981). The Tribe was nomadic, and its members hunted game for subsistence. J. Medicine Crow, From

<sup>26</sup> 139 S. Ct. 1686 (2019).

the Heart of the Crow Country 4–5, 8 (1992). The Bighorn Mountains of southern Montana and northern Wyoming “historically made up both the geographic and the spiritual heart” of the Tribe’s territory. Brief for Crow Tribe of Indians as Amicus Curiae 5.

The westward migration of non-Indians began a new chapter in the Tribe’s history. In 1825, the Tribe signed a treaty of friendship with the United States. Treaty With the Crow Tribe, Aug. 4, 1825, 7 Stat. 266. In 1851, the Federal Government and tribal representatives entered into the Treaty of Fort Laramie, in which the Crow Tribe and other area tribes demarcated their respective lands. Montana, 450 U. S., at 547–548. The Treaty of Fort Laramie specified that “the tribes did not ‘surrender the privilege of hunting, fishing, or passing over’ any of the lands in dispute” by entering the treaty. *Id.*, at 548.

After prospectors struck gold in Idaho and western Montana, a new wave of settlement prompted Congress to initiate further negotiations. See F. Hoxie, *Parading Through History* 88–90 (1995). Federal negotiators, including Commissioner of Indian Affairs Nathaniel G. Taylor, met with Crow Tribe leaders for this purpose in 1867. Taylor acknowledged that “settlements ha[d] been made” upon the Crow Tribe’s lands and that their “game [was] being driven away.” Institute for the Development of Indian Law, *Proceedings of the Great Peace Commission of 1867–1868*, p. 86 (1975) (hereinafter *Proceedings*). He told the assembled tribal leaders that the United States wished to “set apart a tract of [Crow Tribe] country as a home” for the Tribe “forever” and to buy the rest of the Tribe’s land. *Ibid.* Taylor emphasized that the Tribe would have “the right to hunt upon” the land it ceded to the Federal Government “as long as the game lasts.” *Ibid.*

At the convening, Tribe leaders stressed the vital importance of preserving their hunting traditions. See *id.*, at 88 (Black Foot: “You speak of putting us on a reservation and teaching us to farm. . . . That talk does not please us. We want horses to run after the game, and guns and ammunition to kill it. I would like to live just as I have been raised”); *id.*, at 89 (Wolf Bow: “You want me to go on a reservation and farm. I do not want to do that. I was not raised so”). Although Taylor responded that “[t]he game w[ould] soon entirely disappear,” he also reassured tribal leaders that they would “still be free to hunt” as they did at the time even after the reservation was created. *Id.*, at 90.

The following spring, the Crow Tribe and the United States entered into the treaty at issue in this case: the 1868 Treaty. 15 Stat. 649. Pursuant to the 1868 Treaty, the Crow Tribe ceded over 30 million acres of territory to the United States. See Montana, 450 U. S., at 547–548; Art. II, 15 Stat. 650. The Tribe promised to make its “permanent home” a reservation of about 8 million acres in what is now Montana and to make “no permanent settlement elsewhere.” Art. IV, 15 Stat. 650. In exchange, the United States made certain promises to the Tribe, such as agreeing to construct buildings on the reservation, to provide the Tribe members

with seeds and implements for farming, and to furnish the Tribe with clothing and other goods. 1868 Treaty, Arts. III–XII, id., at 650–652. Article IV of the 1868 Treaty memorialized Commissioner Taylor’s pledge to preserve the Tribe’s right to hunt off reservation, stating:

“The Indians . . . shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.” Id., at 650.

A few months after the 1868 Treaty signing, Congress established the Wyoming Territory. Congress provided that the establishment of this new Territory would not “impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty.” An Act to Provide a Temporary Government for the Territory of Wyoming (Wyoming Territory Act), July 25, 1868, ch. 235, 15 Stat. 178. Around two decades later, the people of the new Territory adopted a constitution and requested admission to the United States. In 1890, Congress formally admitted Wyoming “into the Union on an equal footing with the original States in all respects,” in an Act that did not mention Indian treaty rights. An Act to Provide for the Admission of the State of Wyoming into the Union (Wyoming Statehood Act), July 10, 1890, ch. 664, 26 Stat. 222. Finally, in 1897, President Grover Cleveland set apart an area in Wyoming as a public land reservation and declared the land “reserved from entry or settlement.” Presidential Proclamation No. 30, 29 Stat. 909. This area, made up of lands ceded by the Crow Tribe in 1868, became known as the Bighorn National Forest. See App. 234; *Crow Tribe of Indians v. Reppis*, 73 F. 3d 982, 985 (CA10 1995).

The Mandan, Hidatsa, and Arikara tribal nations were signatories to the 1851 Fort Laramie Treaty, unlike the 1868 Fort Laramie Treaty, which was limited to the Crow and Lakota Sioux tribal nations; however, the above summary from *Herrera v. Wyoming* captures many of the same the experiences of other tribal nations of the Upper Great Plains in those decades.<sup>27</sup> This treaty predated formation of Dakota Territory.

The 1851 Fort Laramie Treaty was ratified by the Senate on Sept. 17, 1851, at 11 Stat. 749. In 1866, Newton Edmunds, Governor and *ex-officio* Superintendent of Indian Affairs of Dakota Territory; Major General S. R. Curtis, Orrin Guernsey and Henry W. Reed,

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<sup>27</sup> See also North Dakota Studies Website, Section 3: “The Treaties of Fort Laramie, 1851 & 1868,” which is part of the curriculum for North Dakota studies for all 8<sup>th</sup> graders in North Dakota at [https://www.google.com/search?q=https%3A%2F%2Fwww.ndstudies.gov%2Fgr8%2Fcontent&rlz=1C1CHBF\\_enUS893US893&sxsrf=APq-WBvT71dTIBo\\_aMDXuad7wQsQcspWqg%3A1648658211192&ei=I4dEYsKrC83E0PEPmr2kGA&ved=0ahUKEwiCyaK4ou72AhVNIjOIHZoeQOMQ4dUDCA4&uact=5&oq=https%3A%2F%2Fwww.ndstudies.gov%2Fgr8%2Fcontent&gs\\_lcp=Cgndnd3Mtd2l6EAM6BwgjEOoCECdKBAhBGAFKBAhGGABQjPkBWLaaA2C1rwNoA3AAeACAAWCIAWCSAQExmAEOAEBBoAECsAEKwAEB&sclient=gws-wiz](https://www.google.com/search?q=https%3A%2F%2Fwww.ndstudies.gov%2Fgr8%2Fcontent&rlz=1C1CHBF_enUS893US893&sxsrf=APq-WBvT71dTIBo_aMDXuad7wQsQcspWqg%3A1648658211192&ei=I4dEYsKrC83E0PEPmr2kGA&ved=0ahUKEwiCyaK4ou72AhVNIjOIHZoeQOMQ4dUDCA4&uact=5&oq=https%3A%2F%2Fwww.ndstudies.gov%2Fgr8%2Fcontent&gs_lcp=Cgndnd3Mtd2l6EAM6BwgjEOoCECdKBAhBGAFKBAhGGABQjPkBWLaaA2C1rwNoA3AAeACAAWCIAWCSAQExmAEOAEBBoAECsAEKwAEB&sclient=gws-wiz).

commissioners appointed on the part of the United States to make treaties with the Indians of the Upper Missouri; and the chiefs and headmen of the Arickaree tribe of Indians signed an agreement.<sup>28</sup> It stated:

States may desire to connect a line of stages with the river, at the salient angle thereof about thirty miles below this point, and may desire to establish settlements and convenient supplies and mechanical structures to accommodate the growing commerce and travel, by land and river, the chiefs and headmen of the Arickarees, Gros Ventres [Hidatsa], and Mandans, acting and uniting also with the commissioners of the United States aforesaid, do hereby convey to the United States all their right and title to the following lands, situated on the northeast side of the Missouri River, to wit: Beginning on the Missouri River at the mouth of Snake River, about thirty miles below Ft. Berthold; thence up Snake River and in a northeast direction twenty-five miles; thence southwardly parallel to the Missouri River to a point opposite and twenty-five miles east of old Ft. Clarke; thence west to a point on the Missouri River opposite to old Ft. Clarke; thence up the Missouri River to the Place of beginning.

Area 529 shown on the map below was diminished without compensation by executive order of President Grant, and not by the Senate, on April 12, 1870, six years after the 1864 Act. Then again, ten years later, Area 620 (see Figure 4), more than 6 million acres, was diminished without compensation by executive order of President Hayes, and not by the Senate, on July 13, 1880, sixteen years after the 1864 Act.<sup>29</sup> The following short excerpt from the North Dakota Studies Website, “Creating the Fort Berthold Reservation,” describes the circumstances of the 1880 Hayes executive order:

In 1880, an executive order signed by President Hayes again reduced the size of the Fort Berthold Reservation. When the Northern Pacific Railway (NPRR) reached the reservation in the 1870s, the company asked the federal government to reduce the size of the reservation. The army officers at Fort Stevenson were asked their opinion. Colonel Dan Huston responded that the NPRR had asked for land that was in the traditional and treaty lands assigned to the three tribes for hunting. However, General Nelson A. Miles responded that the tribes had never occupied or hunted on that land. General Alfred H. Terry also supported the railroad’s request.

The Commissioner of Indian Affairs, Roland E. Trowbridge argued that taking the lands from the three tribes would bring hardship to the people of the three tribes. He wrote that “the land west of the Missouri was better for farming and

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<sup>28</sup> Agreement at Fort Berthold, 1866, July 27, 1866, Unratified Indian Office, “Treaties, box 3, 1864-1866.”

<sup>29</sup> See both Grant’s and Hayes’s Presidential executive orders and the summary of the formation of the Fort Berthold Reservation at North Dakota Studies Website, “Creating the Fort Berthold Reservation,” which again is part of the curriculum for North Dakota studies for all 8<sup>th</sup> graders in North Dakota at <https://www.ndstudies.gov/gr8/content/unit-iii-waves-development-1861-1920/lesson-1-changing-landscapes/topic-4-reservation-boundaries/section-4-creating-fort-berthold-reservation#:~:text=In%201880%2C%20an%20executive%20order,the%20size%20of%20the%20reservation> (March 26, 2022).



had more timber.” His statements were ignored, and President Rutherford B. Hayes signed the executive order on July 13, 1880.<sup>30</sup>

President Hayes was given a 930-acre farm north of Bismarck on Hay Creek as a gift from the Northern Pacific soon after he became President in 1877, which he later sold after his Presidency ended. Whether there was a quid pro quo for removing Area 620 from the Fort Berthold Reservation has not been explored by historians.<sup>31</sup>

Figure 4 shows Areas 529, 620, and the part 621 south of the Missouri River that were identified as Arikara, Hidatsa and Mandan tribal nation territories in the Fort Laramie Treaty of 1851.<sup>32</sup>

Area 529 of Figure 4 is bounded by the Heart River all the way to the Missouri River as its southern boundary. The map also shows that area 529 includes both the Missouri River itself and all land west of the Missouri River where the Northern Pacific constructed the Historic Bridge between Bismarck and Mandan as well as the railroad’s right-of-way west of there through the rest of Dakota Territory. This means that *if* all the riverbed up to the ordinary high-water mark at the location of the Historic Bridge was not held in trust as navigable territorial waters to be transferred to the State of North Dakota under the Equal Footing and Public Trust Doctrines when North Dakota became a State on November 2, 1889, *then* the transfer of that same riverbed to the Arikara, Hidatsa, and Mandan peoples under the Fort Laramie Treaty of 1851 is a federal transfer prior in right and time (under both the Louisiana Purchase Treaty of 1803 and the Fort Laramie Treaty of 1851) to any arguable transfer of the riverbed at the Historic Bridge’s location under the 1864 Act, 13 Stat. at L. 365, chap. 217, that created the Northern Pacific in 1864.

BNSF cannot cherry-pick one federal statute involving its predecessor, Northern Pacific, and ignore other federal actions, such as the 1851 Treaty, which is prior both in right and time to the 1864 Act. Northern Pacific was aware of the distribution of tribes, as evidenced by the Pacific Railroad map of 1855 (Figure 5).

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<sup>30</sup> North Dakota Studies Website, “Creating the Fort Berthold Reservation,” supra, footnote 21, at <https://www.ndstudies.gov/gr8/content/unit-iii-waves-development-1861-1920/lesson-1-changing-landscapes/topic-4-reservation-boundaries/section-4-creating-fort-berthold-reservation#:~:text=In%201880%2C%20an%20executive%20order,the%20size%20of%20the%20reservation> (March 26, 2022).

<sup>31</sup> See Presidential Property North of Bismarck --(Dakota Datebook) Friday, September 15, 2006, at <https://www.facebook.com/groups/2030822207183428/posts/2619780344954275> (March 25, 2022). Also see generally the following story from Indian Country Today on President Hayes’s policies regarding Native Americans: Alysa Landry, Rutherford B. Hayes: Introduces Allotment and Dreaded Boarding Schools, Indian Country Today (May 10, 2016, updated Sep. 13, 2018) at <https://indiancountrytoday.com/archive/rutherford-b-hayes-introduces-allotment-and-dreaded-boarding-schools?redir=1>

<sup>32</sup> Map from *Eighteenth Annual Report of the Bureau of American Ethnology*, part 2, 1896-97 (Government Printing Office 1899). Available online at: [https://commons.wikimedia.org/wiki/File:Arikara,\\_Hidatsa\\_and\\_Mandan\\_1851\\_treaty\\_territory\(Area\\_529,\\_620\\_and\\_621\\_south\\_of\\_the\\_Missouri\).png](https://commons.wikimedia.org/wiki/File:Arikara,_Hidatsa_and_Mandan_1851_treaty_territory(Area_529,_620_and_621_south_of_the_Missouri).png) (March 26, 2022).





Figure 5: Tribal Distribution on Pacific Railroad Office Map from Lt. Warren's Report of Military Reconnaissances in the Dakota Country, 1855 (from Culbertson 1952: Map 1).

Further, as will be addressed in the next section of this memorandum, under the rules of constitutional and statutory construction that apply, 1) ownership of the riverbed up to the ordinary high-water mark is held by the State of North Dakota, 2) the right of the Arikara, Hidatsa, and Mandan peoples to fish, travel, and do other activities on the Missouri River as set forth in the Fort Laramie Treaty of 1851 is retained, and 3) the right of the Northern Pacific and its successors to maintain a right-of-way for purposes of maintaining and operating a railroad, are not inconsistent under the law.

Thus, as discussed further below regarding the Public Trust Doctrine, under the rules of construction favored by the law to construe these laws – the Equal Footing and Public Trust Doctrines, the 1851 Treaty and its aftermath, and the 1864 Act – each may be given effect.

### **1.3 Summary of the Connection of the Lewis & Clark Expedition to the Historic Bridge**

When the Lewis and Clark Expedition embarked from St. Charles, Missouri, on May 21, 1804, it had among its purposes to map, explore, and establish jurisdiction over the land transferred to the United States under the 1803 Louisiana Purchase Treaty as well as to find a practical route through the land to the west of the headwaters of the Missouri River to the Pacific coast. Eugene Smalley's *History of the Northern Pacific Railroad*, published in 1883, states: "To

Thomas Jefferson belongs the honor of planning and setting on foot the enterprise of exploring the interior continental region on the line now followed by Northern Pacific Railroad.”<sup>33</sup> Another purpose of the Expedition was to learn and report back the whereabouts, military strength, lives, activities, and cultures of the various Native American tribal nations that inhabited the newly acquired Louisiana Territory of the United States through the Louisiana Purchase, as well as in the northwest in general.

The Expedition spent the winter of 1804–05 at Fort Mandan, east of the mouth of the Knife River, and across the river to the north and east of the Hidatsa and Mandan villages near Stanton, North Dakota, and about 30-40 miles upriver from the future location of the 1883 Northern Pacific Railway Bridge between Bismarck and Mandan. While there over the winter of 1804-05, Lewis and Clark often met in council with Mandan and Hidatsa chiefs and met the French-Canadian fur trapper his young Shoshone wife, Sacagawea, who both served as the Expedition's primary translators and guides for the remainder of their exploratory journey. One of the Mandan Chiefs Lewis and Clark met at Fort Mandan, Sheheke, went with Lewis and Clark on their return journey in 1806 to St. Louis, and then to Washington, D.C., to meet with President Thomas Jefferson.<sup>34</sup>

Starting on October 22, 1804, Clark's journal has several entries regarding the area that was to become Bismarck and Mandan, which cities are both also deeply tied to the Historic Bridge crossing (e.g., Bismarck became the Capital of Dakota Territory in 1883 because of the bridge built at this crossing point). But in 1804, the future crossing of the Historic Bridge was the location of six abandoned Mandan villages near the mouth of the Heart River where the Mandan had lived for hundreds of years prior to that, but which the Mandan people had recently abandoned primarily because of a smallpox epidemic and warfare with the Lakota Sioux. This is evidenced in the Lewis and Clark Journals:

“we passed a War party of Tetons on their way as we Supposed to the Mandans of 12 men on the L. S. [left side] we gave them nothing and refused to put them across the river, passed 2 old Villages at the mouth of a large Creek L. S and a Small Island at the head of which is a bad place, an old Village on the S. S. [starboard side] and the upper of the 6 Villages the Mandans occupied about 25 years ago this village was entirely cut off by the Sioux & one of the others nearly, the Small Pox distroyed great Numbers” (October 22, 1804, Journal Entry).

“Some Snow, passed 5 Lodges (of) fortified the place the two french men were rob[b]ed Those are the hunting Camps of the mandans, who has latterly left them. we camped on the L. S.” (October 23, 1804, Journal Entry).

“Cloudy Some little Snow (my Rhumetism Continue, not So bad as the 2 last days,) a butfull Countrey on both Sides, bottoms covered with wood, we See no game to day, passed an old [village] of a Band of Me ne tarres Called Mah har

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<sup>33</sup> Smalley's *History of the Northern Pacific Railroad*, supra, footnote 4, Chap. III, p. 20.

<sup>34</sup> See, e.g., Stephen Ambrose, *Undaunted Courage: Meriwether Lewis, Thomas Jefferson, and the Opening of the American West* (Touchstone 1996); Tracy Potter, *Sheheke: Mandan Indian Diplomat—The Story of White Coyote, Thomas Jefferson, and Lewis and Clark* (Farcountry Press 2003).

*ha* where they lived 40 year ago on the L. S. Came too on an Island Caused by the river cutting through a narrow point 7 years ago, on this Island we wer visited by the grand Chief of the mandans a 2d Chief and Some other, who wer Camped on the Island, those Chief met our Ricarra Chief with great Corduallity, & Smoked together Cap Lewis Visited the Camps 5 Lodges, and pro-ceeded on & Camped near a 2d Camp of Mandans on the S. S. nearly opposit the old Ricara & Manden Village which the Ricarras abandaned in the year 1789” (October 24, 1804, Journal Entry).<sup>35</sup>

These entries from Clark’s journals help to illustrate the deep connection the Mandan, Hidatsa, and Arikara peoples had to the riverbed and the land on both sides of the Missouri River near the mouth of the Heart River for hundreds of years prior to the 1864 Act, as well as in the preceding decades before construction of the Historic Bridge by the Northern Pacific from 1880-82. This area north of the Heart River was recognized as land belonging to the Mandan, Hidatsa, and Arikara peoples under the Laramie Treaty in 1851. In fact, it was the principal location of Mandan villages for hundreds of years before that (Figure 5). Thus, the land west of the Historic Bridge’s crossing of the Missouri River was thus allotted to them under the 1851 Treaty as shown on the map above. Any claim in the late 1870’s (when the Northern Pacific asked President Hayes to diminish the Forth Berthold Reservation by Executive Order after he became President in 1877) that is premised on a claim that the Mandan people had not occupied, hunted, grown crops and otherwise lived on the land near the Historic Bridge or the Heart River valley and Dakota Territory to the west (see General Miles’ statement accompanying footnote 22 above) was unsupportable at that time.

It remains unsupportable to this day. BNSF cannot destroy the 1883 Northern Pacific Railway Bridge under a permit granted by USCG to BNSF based primarily on a claim by BNSF under the 1864 Act that BNSF owns the equivalent of fee simple title to the riverbed and the bridge while ignoring other equal or superior Acts of Congress like the 1851 Treaty. Other treaties and laws also apply as related in more detail below. All this history is relevant to determining ownership and preservation of the Historic Bridge under the NHPA and federal and state law, including the Equal Footing and Public Trust Doctrines as the controlling law (again, as discussed in more detail below).

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<sup>35</sup> See *Journals of the Lewis & Clark Expedition*, entries for October 22-24, 1804, online at <https://lewisandclarkjournals.unl.edu/item/lc.jrn.1804-10-24> (March 24, 2022)

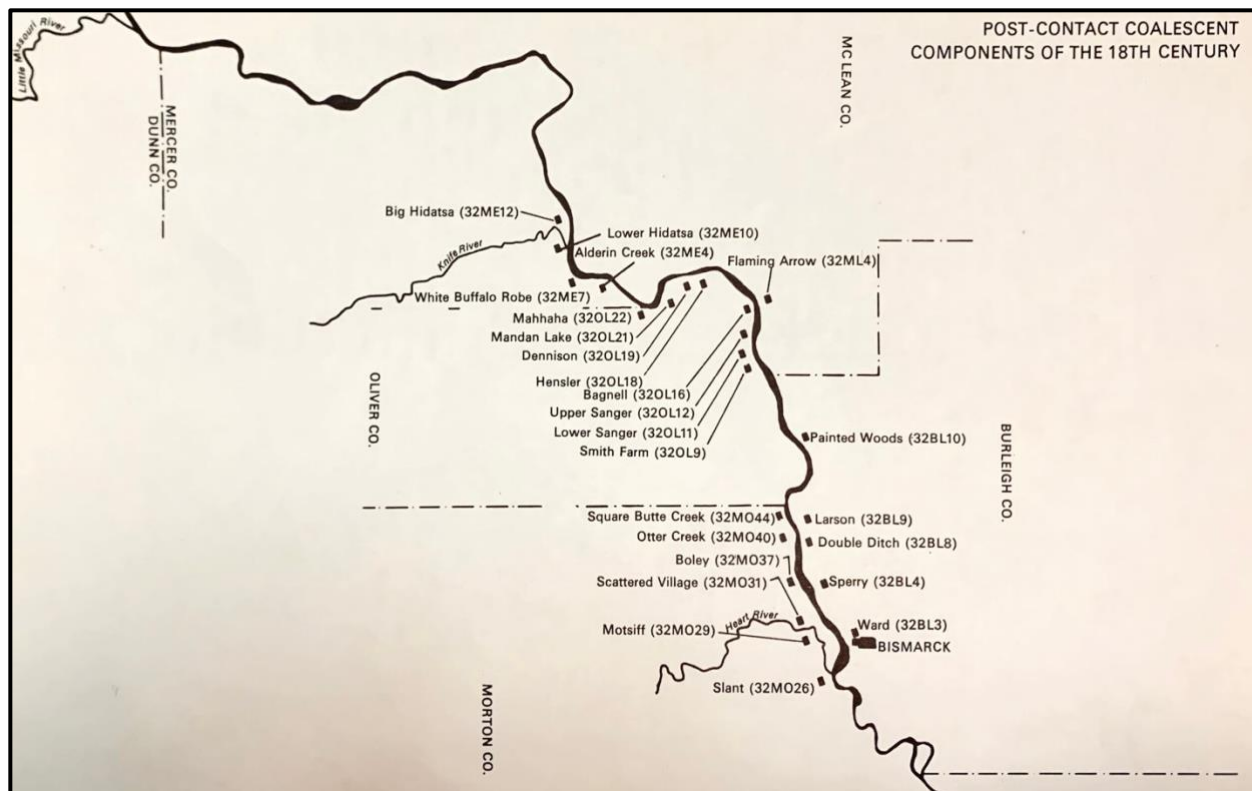


Figure 6: Earthlodge Villages of the Mandan, Hidatsa and Arikara after 1675 (taken from Lehmer 1971:132).

#### 1.4 Summary of the History and Importance of the Equal Footing Doctrine to All Land Covered by the Louisiana Purchase, including Dakota Territory and the 1883 Northern Pacific Crossing Site

In its March 11, 2022, memo, BNSF relies on out of context language from the 1864 Act, as well as an 1891 Supreme Court decision that is easily distinguishable both on the law and under the facts from this case, as BNSF’s primary legal arguments for why BNSF owns the Historic Bridge. Before addressing those arguments in in the context of the controlling law that refutes them, it is helpful to trace the chain of events and actions by Congress and the Executive Branch that constitute the “chain of title and legal ownership” of the riverbed of the Missouri River beneath the Historic Bridge back to the Louisiana Purchase Treaty of 1803. Just as title to any property originally surveyed and transferred under the Homestead Act of 1862 goes back to the original patent issued by the United States, so too does the ownership in the riverbed beneath the Historic Bridge up to the ordinary high-water mark go back to the original documents and transactions from which it is derived – in this case the Louisiana Purchase Treaty.

The actual territory transferred by France to the United States under the Louisiana Purchase Treaty of 1803 is described in Article I of the treaty:

Whereas by the Article the third of the Treaty concluded at St Ildefonso the 9th Vendémiaire an 9 (1st October) 1800 between the First Consul of the French Republic and his Catholic Majesty it was agreed as follows.



"His Catholic Majesty promises and engages on his part to cede to the French Republic six months after the full and entire execution of the conditions and Stipulations herein relative to his Royal Highness the Duke of Parma, the Colony or Province of Louisiana with the Same extent that it now has in the hand of Spain, & that it had when France possessed it; and Such as it Should be after the Treaties subsequently entered into between Spain and other States."

And whereas in pursuance of the Treaty and particularly of the third article the French Republic has an incontestible title to the domain and to the possession of the said Territory--The First Consul of the French Republic desiring to give to the United States a strong proof of his friendship doth hereby cede to the United States in the name of the French Republic for ever and in full Sovereignty the said territory with all its rights and appurtenances as fully and in the Same manner as they have been acquired by the French Republic in virtue of the above mentioned Treaty concluded with his Catholic Majesty.<sup>36</sup>

Article I of the Louisiana Purchase Treaty of 1803 transfers to the United States the “Colony or Province of Louisiana” shown mostly in white on Figure 7, which France had re-acquired from Spain less than three years before under the Treaty of St Ildefonso on October 1, 1800. This Territory consisted of almost all the drainage basins of the Mississippi and Missouri Rivers west of the Mississippi River, and this transfer nearly doubled the size of the United States. Prior to that, the territory of the United States was almost entirely the land east of the Mississippi River ceded by Great Britain in 1783 to the Original 13 States under the Treaty of Paris. See the brown area on Figure 7. As discussed above, all the Louisiana Purchase south of the 33<sup>rd</sup> parallel became the “Territory of Orleans,” which in turn became the State of Louisiana in 1812. The remainder of the Louisiana Purchase territory became the District of Louisiana, later renamed the Territory of Louisiana, then Missouri Territory.



Figure 7: The Louisiana Purchase Treaty of 1803 (National Archives).

<sup>36</sup> The Louisiana Purchase Treaty of 1803, Article I, available online through the National Archives as shown at footnote 14.



After Louisiana was admitted to the Union in 1812, all or parts of 14 other states as shown on the map above were formed from the Louisiana territories: Arkansas, Missouri, Iowa, Oklahoma, Kansas, Nebraska, Minnesota, North Dakota, South Dakota, New Mexico, Texas, Montana, Wyoming, and Colorado. All were admitted on equal footing under the Equal Footing Clause discussed in detail above: “*on an equal footing with the original States in all respects whatever.*”

When Congress created Dakota Territory on March 2, 1861,<sup>37</sup> it consisted of the northernmost part of the land acquired in the Louisiana Purchase in 1803 (land in white on Figure 7), as well as the southernmost part of “Rupert’s Land” (land in dark blue on Figure 7) which the United States acquired in 1818 when the northern boundary of the United States from Lake of the Woods to the western edge of the territory acquired under the Louisiana purchase was changed to the 49th parallel. See generally the map of United States territorial acquisitions above (Figure 7). Dakota Territory was formed from parts of two other territories, Minnesota Territory and Nebraska Territory. Again, it is easier to show these steps with maps, rather than attempting to describe these transactions in words only.<sup>38</sup>



Figure 8: Minnesota Territory.

The Territory of Minnesota existed from March 3, 1849, until May 11, 1858, when the eastern portion of Minnesota Territory was admitted to the Union as the State of Minnesota (Figure 8).

When Minnesota became a state in 1858, the leftover area between the Missouri River and the new State of Minnesota's western boundary became “unorganized” territory. When Congress created Dakota Territory on March 2, 1861, the western boundary of the new State of Minnesota largely became the eastern boundary of Dakota Territory when created in 1861 (Figure 9 brownish-beige area).

The rest of Dakota Territory as first created in 1861 was formed from part of Nebraska Territory. See yellow areas on Figures 9 and 10. The Territory of Nebraska existed from May 30, 1854, until March 1, 1867, when the remaining part of what had been the much larger Territory of Nebraska was admitted to the Union as the State of Nebraska. Nebraska Territory had been created by the Kansas–Nebraska Act of 1854 and was a huge territory that encompassed areas of what is today the States of Nebraska, Wyoming, South Dakota, North Dakota, Colorado, and Montana. See map of Nebraska Territory below (Figure 9).

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<sup>37</sup> Act creating the Territory of Dakota, 12 Stat. 239 (March 2, 1861).

<sup>38</sup> The three maps below were created by Wikipedia, and are accessible from the page on Wikipedia that has links to each former U.S. territory that the United States was formed from, as well as maps showing each of those territories: [https://en.wikipedia.org/wiki/Historic\\_regions\\_of\\_the\\_United\\_States#Former\\_organized\\_territories](https://en.wikipedia.org/wiki/Historic_regions_of_the_United_States#Former_organized_territories) (March 25, 2022).

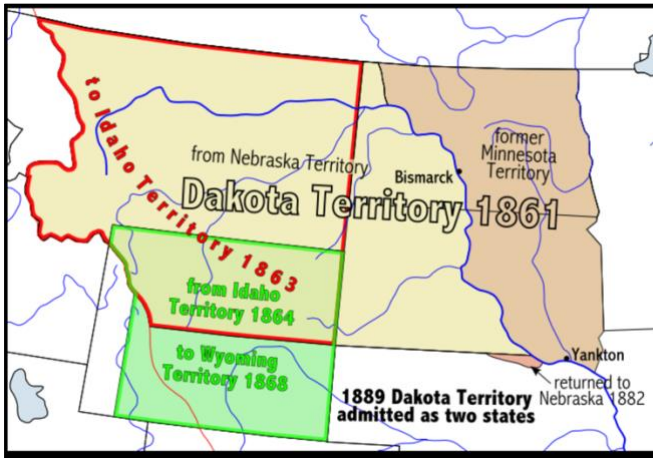


Figure 9: 1861 Map of Dakota Territory showing Former Minnesota Territory.

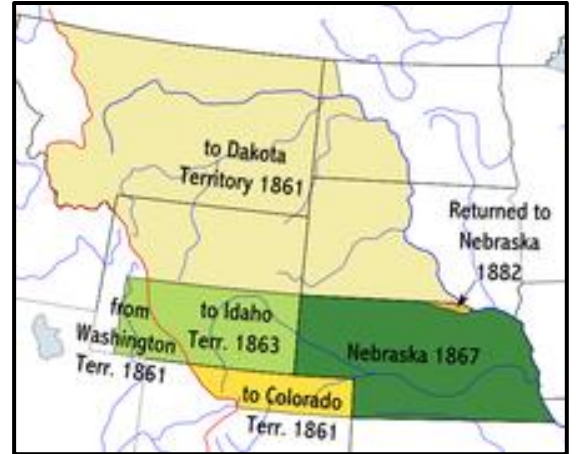


Figure 10: Map Showing Changes in Dakota Territory 1861-1867.

As the map of Dakota Territory above shows, the part of Dakota Territory west of the current western borders of North and South Dakota in turn was made a part of the Territory of Idaho as created by Congress in 1863 (Figure 10), before it was changed by Congress again (Figure 11). As all this arranging and rearranging of the territories of the western United States was occurring, the Civil War raged on; Congress's focus on creating new States and expanding the United States to the Pacific Ocean was essential to creating whatever the United States was to be after the Civil War ended, which, at the time that all this shuffling of territories to create new States was occurring, was yet to be determined.



Figure 11: 1863 Map of Idaho Territory.

This post-1863 Dakota Territory did not change again from 1863-1889 after the western part of the original 1861 Dakota Territory was diminished by transferring the western part of Dakota Territory to Idaho Territory in 1863 (Figure 10). This smaller Dakota Territory is the Dakota Territory in existence when the 1864 Act creating the Northern Pacific was enacted by Congress, and when this smaller 1863-89 Dakota Territory was split into the two States of North Dakota and South Dakota and admitted to the Union on "equal footing" with all other States, on November 2, 1889.

In summary, the Equal Footing Doctrine was and is the essential doctrine that admitted each new State to the Union on "equal footing" with all other States, including the original 13 States. For the reasons discussed above, if the Equal Footing Doctrine had not become the law of the land, the Constitution may never have been signed, and the Union that the Constitution created may never have been formed.

When the Constitution was signed in Philadelphia on September 17, 1787, a large amount of the “commerce” between the States, and with both tribal and foreign nations, occurred on the navigable waters of the United States up to their ordinary high-water mark. Thus, almost all cases first decided by the United States Supreme Court under the Commerce Clause<sup>39</sup> of the Constitution – which gives Congress the power “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes” – dealt almost exclusively with the authority between States and the Federal government over who had supremacy to regulate commerce on these navigable waterways. In Jefferson’s first term as President, *Marbury v. Madison*<sup>40</sup> had established the principle of judicial review under which courts have authority to strike down laws and statutes that violate the Constitution, and to “say what the law is” under the Separation of Powers Doctrine that makes courts the final arbiters that define the boundaries of authority between the legislative, executive, and judicial branches of the government. So, for example, a local, state, or federal law can be struck down under the Commerce Clause if it unlawfully interferes with, or discriminates against, interstate commerce.

In the early United States, the “main highways of commerce” were the harbors, navigable lakes, and navigable rivers where interstate commerce primarily occurred. Thus, the first major case decided by the Supreme Court under the Commerce Clause, *Gibbons v. Ogden*, held that Congress’s power to regulate interstate commerce under the Commerce Clause included not only the power to regulate the interstate trading of goods, but also encompassed the power to regulate navigation. (“The power of Congress, then, comprehends navigation, within the limits of every State in the Union; so far as that navigation may be, in any manner, connected with ‘commerce with foreign nations, or among the several States’.”).<sup>41</sup>

When *Martin v. Waddell's Lessee*<sup>42</sup> established the Public Trust Doctrine for the first time under United States law, it did not change the authority of Congress to regulate navigable waterways under the Commerce Clause to keep them open for interstate commerce as established in *Gibbons v. Ogden*. Rather *Martin v. Waddell's Lessee* addresses a related issue: whether the original 13 States continued to own and have the right to regulate the riverbeds and shores of navigable waterways up to their ordinary high-water mark as recognized in the common law of both the United States and England at the time that the original 13 States drafted and signed the Constitution.

As discussed in more detail in the next section of this memorandum, the Public Trust Doctrine holds in trust the original 13 States’ ownership and right to regulate the riverbeds and shores of navigable waters, subject only to the federal government’s authority under the Commerce Clause to keep those waterways open for the purpose of navigation. The Equal Footing Doctrine extends the rights of ownership and control given to the original 13 States under the Public Trust Doctrine to all States admitted to the Union after the original 13 States, thus giving all States the same ownership in riverbeds and shores of their navigable waterways as the original 13 States. For the reasons discussed below, this includes ownership of the riverbed

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<sup>39</sup> Article 1, Section 8, Clause 3 of the U.S. Constitution.

<sup>40</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>41</sup> 22 U.S. (9 Wheat.) 1, 197-98 (1824).

<sup>42</sup> 41 U.S. 367 (1942).

up to the ordinary high-water mark of the 1883 Northern Pacific Railway Bridge between Bismarck and Mandan.

Before discussing the Equal Footing and Public Trust Doctrines as the controlling black letter law that determine ownership of the riverbed in this case, it is helpful to summarize the fundamental underlying common law principles relating to riverbeds and shorelines that underlie the Public Trust Doctrine.

### **1.5 Summary of common law principles that underlie the Public Trust Doctrine**

The Public Trust Doctrine set forth in *Martin v. Waddell's Lessee* is one of the oldest and most established principles of the common law. The principle of sovereign ownership and control of land under navigable waters began under Roman law. Justinian in *The Institutes* stated that "all of these things are by natural law common to all: air, flowing water, the sea and, consequently, the shores of the sea."<sup>43</sup> Justinian's original "Public Trust" doctrine was cited and developed in the common law of England (i.e., the written decisions of courts in contested cases), then summarized in various treatises cited by courts in their written opinions deciding those cases. Among the most important of these early treatises was Bracton's mid-thirteenth century treatise *On the Laws and Customs of England*, in which Bracton relied on Justinian's *The Institutes* for the ancient common law doctrine that the sea and seashore were held by the sovereign for the common good of all.<sup>44</sup> So did Lord Chief Justice Hale's treatise *De Jure Maris et Brachioirem Ejusdem* (Concerning the Law of the Sea and its Arms), written around 1666 but not published until 1786.<sup>45</sup> Thus, the common law doctrine that underlies the ownership of seashores and riverbeds up to the ordinary high-water mark is one of the oldest and most established principles under the common law, and, as will be discussed below, under the U.S. Constitution and Supreme Court case law.

The first case applying an early version of the Public Trust Doctrine under the common law was *Arnold v. Mundy*,<sup>46</sup> an 1821 decision by the New Jersey Supreme Court. The case arose when Robert Arnold claimed that Benajah Mundy had unlawfully trespassed on his oyster bed and stolen his planted oysters. The primary issue was whether Arnold possessed a valid title to the oyster bed through conveyances that dated back to a royal charter from Charles II, King of England, under which the king had granted title to the tidewater along the Coast of New Jersey to his brother, the Duke of York, thereby excluding the general public from entering and gathering oysters from that commonly held public resource (in this case oysters in a tidewater zone).<sup>47</sup>

*Arnold v. Mundy* determined that the validity of Arnold's title depended on the King's power to convey such title. *Arnold v. Mundy*'s central finding was that title to land under navigable water was placed in the hands of the sovereign "to be held, protected, and regulated for the common use and benefit." The decision in *Arnold v. Mundy* held that the crown could not grant

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<sup>43</sup> *The Institutes*, 2.1.1-5.

<sup>44</sup> 2 H. Bracton, *On the Laws and Customs of England*, at pp. 39-40 (S. Thome trans., 1968).

<sup>45</sup> See, e.g., Patrick Deveney, *Title, Jus Publicum, and the Public Trust: An Historical Analysis*, 1 *Sea Grant Law Journal* 13 (1976).

<sup>46</sup> 6 N.J.L. 1 (N.J. 1821).

<sup>47</sup> *Arnold*, 6 N.J.L. at 65-78.

land under navigable water, rejecting Hale's statement in *De Jure Maris et Brachioirem Ejusdem* that "the king may grant fishing within a creek of the sea, and that he may also grant a navigable river that is an arm of the sea, with the water and soil thereof." *Arnold v. Mundy* held instead that prior to Magna Charta the crown had made such grants to private individuals, but after Magna Charta the crown had no right to grant land under navigable waters and was obligated to hold such lands "as a trustee to support the title for the common use." Thus, the holding in *Arnold* was that Arnold's grant was void and the Court discharged the trespass claim against Mundy.<sup>48</sup>

*Arnold v. Mundy* was discussed in *Martin v. Waddell's Lessee* as part of the majority opinion,<sup>49</sup> and in the dissent by Justice Thompson, where he states inconsistently with the reasoning of his dissent, that "the power which may be exercised by the sovereignty of the state, is nothing more than what is called the jus regium. The right of regulating, improving, and securing the same, for the benefit of every individual citizen. The sovereign power itself, therefore, cannot consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of a common right. It would be a grievance which never could be long borne by a free people."<sup>50</sup>

In England, the sovereign was the crown; in contrast, in the United States the ultimate sovereign under the Constitution is the people – as made clear in the Preamble to the Constitution which famously begins: "We the People." Thus, the holding in *Arnold v. Mundy* that the "sovereign" held tidelands "as a trustee to support the title for the common use" points in the direction the United States Supreme Court would go 21 years later in *Martin v. Waddell's Lessee* when the Supreme Court first enunciated what has come to be known as the Public Trust Doctrine. *Martin v. Waddell's Lessee* would call this obligation of the sovereign to hold submerged lands under navigable waters up to the ordinary high-water "as a trustee to support the title for the common use" a "public trust."<sup>51</sup>

James Kent, an American, published in 1828 the authoritative four-volume treatise under both United States and English law on rights to tidelands and the fishery. Kent summarized the common law in both England and the United States as it existed in 1828 as follows:

It is a settled principle in the English law, that the right of soil of owners of land bounded by the sea, or on navigable rivers, where the tide ebbs and flows, extends to the high-water mark; and the shore below common, but not extraordinary high-water mark, belongs to the public; and in England the crown, and in this country the people, have the absolute proprietary interest in the same, though it may, by grant or prescription, become private property.<sup>52</sup>

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<sup>48</sup> *Arnold*, 6 N.J.L. at 65-78.

<sup>49</sup> 41 U.S. at 417.

<sup>50</sup> 41 U.S. at 420.

<sup>51</sup> *Martin v. Waddell's Lessee*, 41 U.S. at 413.

<sup>52</sup> 3 James Kent, *Commentaries on American Law*, p. 344 (1828). Kent's four-volume work went through 14 editions and was last published in 1896.



## **2.0 Issues to be resolved in this case regarding ownership of 1) the riverbed beneath the Historic Bridge and 2) ownership in the Historic Bridge itself.**

Prior to walking through the Supreme Court cases that govern ownership of the riverbed below the historic 1883 Northern Pacific Railway Bridge, and ownership of the bridge itself, it is useful to state what the legal issues are:

1. Between the Equal Footing and Public Trust Doctrines versus the 1864 Act that created the Northern Pacific, which law governs who has superior title to the riverbed up to the ordinary high-water mark beneath the Historic Bridge, and what kind of ownership interest, if any, did the Northern Pacific acquire under the 1864 Act?
2. If the State of North Dakota owns the riverbed beneath the historic 1883 Northern Pacific Railway Bridge under the Equal Footing and Public Trust Doctrines, what ownership was transferred to the State of North Dakota in the structures and fixtures that were attached to that riverbed when North Dakota became a State on November 2, 1889?

As noted previously, in its March 11, 2022, memorandum BNSF relies on out of context language from the 1864 Act, as well as an 1891 Supreme Court decision that is easily distinguishable both on the law and under the facts from this case, as BNSF's primary legal arguments for why BNSF owns the Historic Bridge. Just as title to any property originally surveyed and transferred under the Homestead Act of 1862 goes back to the original patent issued by the United States, so too does the ownership in the riverbed beneath the Historic Bridge up to the ordinary high-water mark go back to the original documents and transactions from which that ownership is derived – in this case the Louisiana Purchase Treaty as discussed in detail above.

Having gone through the above steps to provide the context for understanding why the Equal Footing Doctrine is the controlling law in this case, this memo will next discuss the related and intertwined Public Trust Doctrine.

Once ownership of the riverbed is established under the Equal Footing Doctrine and Public Trust Doctrines, this memo will then discuss the next question, which is ownership of the fixtures attached to the riverbed at the time that the riverbed up to its ordinary high-water mark was transferred to North Dakota when it became a State on November 2, 1889.

**2.1 Between the Equal Footing and Public Trust Doctrines versus the 1864 Act that created the Northern Pacific, the Equal Footing and Public Trust Doctrines (and the rules of construction that apply to those doctrines under Supreme Court precedent) give ownership of the riverbed up to the ordinary high-water mark to North Dakota when it became a State on November 2, 1889. Further, construing these laws to give effect to each, the ownership interest transferred to the Northern Pacific under the 1864 Act was only a right-of-way easement to build, maintain, and operate a railroad; the 1864 Act does not give Northern Pacific title or ownership to the riverbed beneath the Historic Bridge.**

The issue of public versus private ownership of land under navigable waters of the United States was not addressed by the United States Supreme Court until 1842 in *Martin v. Waddell's Lessee*,<sup>53</sup> which established the Public Trust Doctrine for the first time under United States law.

*Martin v. Waddell's Lessee*, like *Arnold v. Mundy* discussed above, involved not only oyster beds located on mudflats in the Raritan River near the port of Perth Amboy, New Jersey, but in fact “a very large territory, extending along the Atlantic coast from the river St. Croix to the Delaware bay,”<sup>54</sup> which King Charles had granted to his brother, the Duke of York. Ownership of the shorelines of all the original colonies that became the States had similar disputes. Thus, the decision in *Martin v. Waddell's Lessee* would determine not only who had the right to harvest oysters and fish from the shore of a very large portion of the New Jersey shoreline, but also for the shoreline of navigable waters over much of the rest of the United States.

When looking at whether Charles II’s grant to the Duke was valid, the *Martin v. Waddell's Lessee* Court stated that it would “inquire into the character of the right claimed by the British crown in the country discovered by its subjects, on this continent; and the principles upon which it was parceled out and granted.”<sup>55</sup>

Deciding who owned the shoreline up to the ordinary high-water mark in New Jersey, the State or the oyster bed’s “proprietor,” the *Martin v. Waddell's Lessee* Court based its decision on the “right of discovery” doctrine, which gave title to the shoreline to the original European colonists of New Jersey – that is, the shoreline of New Jersey was not held by the crown to dispose of as private property (in this case, the King to his brother), but rather the shoreline was held in trust by the crown for the benefit of the colonists who had discovered it. The “right of discovery” doctrine was summarized by the *Martin v. Waddell's Lessee* as follows:

The English possessions in America were not claimed by right of conquest but by right of discovery. For according to the principles of international law, as then understood by the civilized powers of Europe, the Indian tribes in the new world were regarded as mere temporary occupants of the soil, and the absolute rights of property and dominion were held to belong to the European nation by which any particular portion of the country was first discovered. Whatever forbearance may have been sometimes practi[c]ed towards the unfortunate aborigines, either from humanity or policy, yet the territory they occupied was disposed of by the governments of Europe at their pleasure, as if it had been found without inhabitants. The grant to the Duke of York, therefore, was not of lands won by the sword; nor were the government or laws he was authorized to establish intended for a conquered people.<sup>56</sup>

The “right of discovery” doctrine under international law at the time of colonization of the United States underlies not only who owned the ocean shoreline of New Jersey, but also who owned almost all the rest of the land acquired by the United States under various treaties and purchases. For example, the “right of discovery” doctrine was the legal basis under international

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<sup>53</sup> 41 U.S. 367 (1842). See footnote 49 above and accompanying analysis.

<sup>54</sup> 41 U.S. at 408.

<sup>55</sup> 41 U.S. at 409.

<sup>56</sup> 41 U.S. at 409.

law under which Great Britain, France, and Spain each claimed title to various parts of the Mississippi and Missouri River basins; it was also why those nations claimed title to those areas over the Native American nations that inhabited those territories. The “right of discovery” doctrine was also, for example, why Thomas Jefferson labelled the Lewis & Clark Expedition “The Corps of Discovery” and required Lewis and the rest of the Corps to keep extensive journals of the expedition: by doing so, Jefferson was establishing title in the United States under international law through the “right of discovery” doctrine to not only the upper reaches of the Missouri River, but also to the land to the west of there that had not yet met the legal test under developing international law at that time of being “discovered.”

The “right of discovery” doctrine, as further explained in *Martin v. Waddell's Lessee*, goes on to say that lands acquired under that doctrine are “held by the king in his public and regal character as the representative of the nation, and *in trust* for them.”<sup>57</sup> (Emphasis supplied.) The *Martin v. Waddell's Lessee* Court further explains the “right of discovery” doctrine as follows:

The [“right of discovery” doctrine] is clearly stated in the case of *Johnson v. McIntosh*, 8 Wheat. 595 ... [which] after stating it to be a principle of universal law that an uninhabited country, if discovered by a number of individuals who owe no allegiance to any government, becomes the property of the discoverers, proceed to say that, “If the discovery be made and possession taken under the authority of an existing government which is acknowledged by the emigrants, it is supposed to be equally well settled that the discovery is made for the benefit of the whole nation; and the vacant soil is to be disposed of by that organ of the government which has the constitutional power to dispose of the national dominions; by that organ, in which all territory is vested by law.”<sup>58</sup>

It is the authority of the United States as the “organ of the government which has the constitutional power to dispose of the national dominions” noted above in *Martin v. Waddell's Lessee* that underlies, to this day, the United States’ ownership and power to dispose of the millions of acres of federal lands in the western United States; it was, more importantly to this case, also the authority that underlay the transfer of all original patents granted by the United States to homesteaders under the Homestead Act of 1862 as well as the transfer of the riverbed of the Missouri river beneath the 1883 Northern Pacific Railway Bridge up to its ordinary high-water mark when North Dakota became a State *because* that property had been held in trust for North Dakota as navigable territorial waters under the Public Trust Doctrine.

*Martin v. Waddell's Lessee* holds that under the common law, as modified by the “right of discovery” doctrine discussed above, that “dominion and property in navigable waters, and in the lands under them, [were] held by the king *as a public trust*.”<sup>59</sup> (Emphasis supplied.) This holding was part of a longer rhetorical question, and is worth repeating: “the shores, and rivers, and bays, and arms of the sea, and the land under them, [are] held as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, as well for shell-fish

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<sup>57</sup> 41 U.S. at 409.

<sup>58</sup> 41 U.S. at 409-10.

<sup>59</sup> 41 U.S. at 413.

as floating fish.”<sup>60</sup> The answer to the rhetorical question, which is also the underlying holding in *Martin v. Waddell's Lessee*, is that the transfer of the shoreline by King Charles to his brother, the Duke of York, was governed by the “right of discovery” doctrine and the Public Trust Doctrine as set forth in *Martin v. Waddell's Lessee*, rather than being converted by “the charter” between Charles II and his brother, the Duke of York, “into private property, to be parcel[ed] out and sold by the duke for his own individual emolument.”<sup>61</sup> Similarly, the riverbed under the Historic 1883 Bridge between Bismarck and Mandan was held in trust under the Public Trust Doctrine for North Dakota for when it became a State; it was not transferred to the Northern Pacific to be parceled out and sold for the railroad’s own individual emolument under the 1864 Act.

It is from the public “public trust” language in *Martin v. Waddell's Lessee* that the Public Trust Doctrine derives its name. Since then, the Public Trust Doctrine has been firmly embedded in American constitutional law in, for example, *Pollard v. Hagan*,<sup>62</sup> *Illinois Cent. R.R. v. Illinois*,<sup>63</sup> *Shively v. Bowlby*,<sup>64</sup> *United States v. Holt State Bank*,<sup>65</sup> and *Utah v. United States*.<sup>66</sup> It is this long-established black letter law version of the Public Trust Doctrine, that the states own the submerged soil and the shorelines of all navigable bodies of water up to their ordinary high-water mark, that is the controlling black letter law in this case. FORB is not relying in this case on the newer, highly contested version of the public trust doctrine that tries to expand the black-letter Public Trust Doctrine first enunciated in *Martin v. Waddell's Lessee*. This newer version of the public trust doctrine attempts to expand upon the “all of these things are by natural law common to all: air, flowing water, the sea and, consequently, the shores of the sea” concept as first announced by Justinian in *The Institutes* as a core principle of the Roman common law.<sup>67</sup>

In this memorandum, FORB is relying on the black letter law version of the Public Trust Doctrine first enunciated in *Martin v. Waddell's Lessee*. The Public Trust Doctrine as enunciated in *Martin v. Waddell's Lessee* gave the original 13 States title to the submerged soil and the shorelines of all navigable bodies of water up to their ordinary high-water mark in part because,

when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government. A grant made by their

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<sup>60</sup> 41 U.S. at 413.

<sup>61</sup> 41 U.S. at 413.

<sup>62</sup> 44 U.S. (3. How.) 212, 221 (1845).

<sup>63</sup> 146 U.S. 387 (1892).

<sup>64</sup> 152 U.S. 1 (1894).

<sup>65</sup> 270 U.S. 49 (1926).

<sup>66</sup> 403 U.S. 9 (1971).

<sup>67</sup> *The Institutes*, 2.1.1-5; see, e.g., the seminal article from 1970, Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970), and the flurry of law reviews in the 1980s that were its progeny, e.g., Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 Iowa L. Rev. 631, 633-34 (1986); Harrison C. Dunning, *The Public Trust Doctrine and Western Water Law: Discord or Harmony?*, 30 Rocky Mtn. Min. L. Inst. 17 (1985); James L. Huffman, *Trusting the Public Interest to Judges: A Comment on the Public Trust Writing of Professors Sax, Wilkinson, Dunning and Johnson*, 63 Den. U. L. Rev. 565 (1986).

authority must therefore manifestly be tried and determined by different principles from those which apply to grants of the British crown.<sup>68</sup>

Three years later, in *Pollard v. Hagan*,<sup>69</sup> the Supreme Court expanded the application of the Public Trust Doctrine enunciated in *Martin v. Waddell's Lessee*, which had applied only to the original 13 States who had fought in the Revolution, to all other States admitted to the Union under the Equal Footing Doctrine, which, for that reason, was discussed in detail in the first part of this memorandum.

Unlike the question of New Jersey's title in *Martin v. Waddell's Lessee*, which dealt with the power of the crown to transfer tidewaters to an individual rather than hold them in trust, Alabama's ownership in *Pollard v. Hagan* depended on the power of the United States, rather than the crown, to own or convey land under navigable waters. The issue in *Pollard v. Hagan* was whether the United States could retain or reserve for itself at the time of statehood land under navigable waters within Alabama, then grant that land to private individuals. Would Alabama, like New Jersey, begin statehood with clear title to its shorelines up to their ordinary high-water mark? To address this issue, *Pollard v. Hagan* used the Equal Footing Doctrine for the first time in any decision by the Supreme Court to address whether the Public Trust Doctrine applied only the original 13 States that had fought in the Revolution, or also applied to new States admitted to the union after the original 13 States.

*Pollard v. Hagan* framed this issue broadly, addressing whether the United States had any power to convey prior to statehood, or to retain after statehood, any land under navigable waters or shorelines up to the ordinary high-water mark. *Pollard v. Hagan* articulated for the first time and applied the Equal Footing Doctrine in a case before the Court, discussing how under the deeds of cession executed by Virginia and Georgia, and under the Northwest Ordinance, any new states created out of the ceded territory must enter the Union on an equal sovereign footing with the original 13 states.<sup>70</sup> Since Alabama was formed from land ceded by Georgia to the United States, the Court then stated that for Alabama to enter the Union on an equal footing, Alabama must succeed to "all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession [i.e., from Georgia to the United States], and the legislative acts connected with it."<sup>71</sup> As soon as any temporary purposes in the deed of cession from Georgia to the United States were accomplished, "the power of the United States over these lands, as property, was to cease."<sup>72</sup>

Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine,

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<sup>68</sup> 41 U.S. at 410-11.

<sup>69</sup> 44 U.S. (3. How.) 212, 221 (1845).

<sup>70</sup> 44 U.S. at 221-22.

<sup>71</sup> 44 U.S. at 223.

<sup>72</sup> 44 U.S. at 224.



is to deny that Alabama has been admitted into the Union on an equal footing with the original States, the constitution, laws, and compact, to the contrary notwithstanding.<sup>73</sup>

The Court in *Pollard v. Hagan* emphasized that the United States had no right at all "to transfer to a citizen the title to the shores and the soils under the navigable waters."<sup>74</sup> "To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of State sovereignty."<sup>75</sup> The controlling law in applying the Equal Footing Doctrine to riverbeds and shorelines of territorial waters held in trust by the United States under the Public Trust Doctrine is this: "The right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case"<sup>76</sup> (i.e., land under navigable waters up to the ordinary high-water mark). The Court also emphasized the distinction between the navigation servitude and the other sticks in the bundle that make up ownership of the shoreline and riverbeds. While the navigational servitude had been granted by the states to the United States in the Constitution, the Court was emphatic that "the shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively."<sup>77</sup>

*Martin v. Waddell's Lessee*, decided in 1842, and *Pollard v. Hagan*, decided in 1845, were long-established black letter law when the 1864 Act that created the Northern Pacific was enacted. If the 1864 Act is the equivalent to a "deed" upon which BNSF is attempting to rely as the evidence for BNSF's ownership of the 1883 Northern Pacific Railway Bridge between Bismarck and Mandan, then *Martin v. Waddell's Lessee* and *Pollard v. Hagan* are the controlling black letter law that govern how that "deed," the 1864 Act, is to be interpreted. As such, any ambiguity about whether the 1864 Act overrides the Public Trust Doctrine, which held the riverbed up to the ordinary high-water mark for North Dakota until it became a State, must be construed in favor of the people of North Dakota as the ultimate owners of this historic landmark. As the long-established black letter law when the 1864 Act became law, "[t]he right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the [Northern Pacific] the land [now in 2022] in controversy in this case."<sup>78</sup> This means that the land under navigable waters up to the ordinary high-water mark was transferred under the Equal Footing and Public Trust Doctrines to the State of North Dakota when it became a State on November 2, 1889, including the riverbed beneath the 1883 Northern Pacific Railway Bridge between Bismarck and Mandan, as well as the bridge itself as a fixture attached to that land at the time when transfer of ownership and title was made to North Dakota.

Since the Public Trust and Equal Footing Doctrines as enunciated in *Martin v. Waddell's Lessee* and *Pollard v. Hagan* come up only in rare cases like this one involving ownership of

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<sup>73</sup> 44 U.S. at 228-29.

<sup>74</sup> 44 U.S. at 230.

<sup>75</sup> 44 U.S. at 230.

<sup>76</sup> 44 U.S. at 230.

<sup>77</sup> 44 U.S. at 230.

<sup>78</sup> 44 U.S. at 230.

riverbeds of navigable waters, it is useful to use an analogy to explain them in terms of real estate property law that can be more easily understood, in this case, a contract to purchase a lot and build a new house.

The analogy is this: a contract to purchase a yet to be built house usually identifies the land to be transferred after the house is built, and often includes a sidewalk in the plat drawing to accommodate the easement given to the public to cross that property for as long as that house and neighborhood are there. When the newly constructed property is transferred to its first owner by deed after construction of the house and sidewalk are completed, both the house and sidewalk are transferred to the new owner as his or her property. The easement to pass over the property does not give the public ownership of the sidewalk, which is a fixture attached to the real estate that is transferred to and owned by the new owner of the lot when the deed transfers ownership – in the same way that the house is transferred. That is the case here. The Public Trust Doctrine is like the contract to purchase the lot and all fixtures attached to it, including the house and sidewalk (in this case, the historic 1883 bridge between Bismarck and Mandan). The 1864 Act helps define the extent of the right-of-way easement given to the Northern Pacific, but it does not give the Northern Pacific, or its successor BNSF, either ownership of the riverbed up to its ordinary high-water mark, or of the 1883 Northern Pacific Railway Bridge itself, both of which were transferred to the State of North Dakota on November 2, 1889, when North Dakota became a State on equal footing with the 38 other States admitted to the Union before North Dakota.

In summary, both the riverbed and the bridge as a fixture deeply attached to the riverbed were transferred to North Dakota at the time of statehood; that is, North Dakota owns both the riverbed, and the 1883 Northern Pacific Railway Bridge transferred to North Dakota as a fixture attached to that riverbed, under the Equal Footing and Public Trust Doctrines, which were in 1864, and remain today, the controlling black letter law, as first enunciated in *Martin v. Waddell's Lessee* and *Pollard v. Hagan*, for the reasons discussed in excruciating detail above.

### **2.1.1 Construing the extent of the easement transferred to Northern Pacific under the 1864 Act.**

*Martin v. Waddell's Lessee* also stated for the first time the most important rule of legal construction that applies under the Public Trust Doctrine in determining the nature and extent of the right-of-way easement given for the Northern Pacific's original railway line across all the western territories of the United States west of Bismarck and Mandan (historically referred to as the "Gateway to the West"; see territorial maps in section 1.4 of this memorandum above for the various territories that the transcontinental railway crossed under the 1864 Act). The rule of construction that applies to the Northern Pacific's right-of-way easement under the Public Trust Doctrine, as first set forth in *Martin v. Waddell's Lessee*, is quoted in and followed in *Shively v. Bowlby*.<sup>79</sup>

All grants of the Crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants; and upon this just ground, that the prerogatives and rights and emoluments of the Crown being conferred upon it for great purposes, and for the public use, it shall not be

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<sup>79</sup> 152 U.S. 1 (1894).

intended that such prerogatives, rights and emoluments are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away.<sup>80</sup>

In the same place in the opinion cited above, *Shively v. Bowlby* quotes from the 1837 case, *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge*,<sup>81</sup> which held that a "state ought never to be presumed to surrender..." those powers which the "whole community have an interest in preserving... undiminished." Such is the case with preserving the historic 1883 bridge between Bismarck and Mandan under the NHPA. Under the *Martin v. Waddell's Lessee* rule of construction that is restated in *Shively v. Bowlby*, whatever property interest in the right-of-way that was transferred to the Northern Pacific in the 1864 Act cannot be construed "beyond what such grant by necessary and unavoidable construction shall take away."<sup>82</sup> In the case of the Historic Bridge between Bismarck and Mandan, the transfer of the riverbed below the Historic Bridge as well as the bridge itself were transferred to North Dakota at Statehood, leaving to the Northern Pacific (and BNSF) a right-of way easement as the limited transfer implied under the rule of construction that limits transfers under the Public Trust Doctrine to nothing "beyond what such grant by necessary and unavoidable construction shall take away."<sup>83</sup>

As noted in FORB's February 8<sup>th</sup> memorandum, *Shively v. Bowlby* summarizes the application of the Equal Footing and Public Trust Doctrines to navigable territorial waters:

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 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.<sup>84</sup>

In 1971, seventy-seven years after *Shively v. Bowlby* restated the rule of construction that applies to the Public Trust Doctrine (as first set forth in 1842 in *Martin v. Waddell's Lessee*), the

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<sup>80</sup> *Shively v. Bowlby*, 152 U.S. at 10.

<sup>81</sup> 36 U.S. (11 Pet.) 420, 546-48 (1837).

<sup>82</sup> *Shively v. Bowlby*, 152 U.S. at 10.

<sup>83</sup> *Shively v. Bowlby*, 152 U.S. at 10.

<sup>84</sup> *Shively v. Bowlby*, 152 U.S. at 86.

Court in *Utah v. United States*<sup>85</sup> restated in even more exacting terms the rule of construction that applies to the Public Trust Doctrine:

The principles articulated in *Shively* have been applied a number of times by this Court, and in each case we have consistently acknowledged congressional policy to dispose of sovereign lands only in the most unusual circumstances .... It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain. We have stated that [a] court deciding a question of title to the bed of a navigable water must ... begin with a strong presumption against conveyance by the United States, and must not infer such a conveyance unless the intention was definitely declared or otherwise made very plain, or was rendered in clear and especial words, or unless the claim confirmed in terms embraces the land under the waters of the stream.<sup>86</sup> (Citations omitted.)

There are several points to make for each part of this clarified rule of construction as it relates to the 1883 historic bridge between Bismarck and Mandan under the 1864 Act:

- First, “the most unusual circumstances” do not exist in this case. The holding of *Martin v. Waddell's Lessee* established the Public Trust Doctrine as it applies to navigable waterways. The holding of *Pollard v. Hagan* extended the Public Trust Doctrine to new States like North Dakota admitted to the Union. These doctrines are not inconsistent with the overall intent of the 1864 Act, which was to 1) connect the westernmost point of the St. Lawrence seaway at Duluth to Pacific ports near Seattle and Portland, and 2) to facilitate settlement on both sides of the railway by giving the Northern Pacific the ability to issue “railroad patents” to homesteaders for odd numbered sections of land for twenty miles on each side of the right-of-way in the states and forty miles in the territories to pay for building a second transcontinental railroad during the darkest days of the Civil War.

These multiple purposes and intents under the Public Trust and Equal Footing Doctrines are not inconsistent; rather they can be construed together to give intent to each by recognizing the ownership of the riverbed and its fixtures granted to North Dakota at the time of statehood under the Public Trust Doctrine, while also recognizing the right-of-way easement granted to the railroad for the explicit and implicit purposes just mentioned: to connect the two northern seacoasts of the United States and to settle the interior territories of the United States with enough inhabitants to qualify them to become new States during the throes of the Civil War and afterwards.

- Second, “disposals by the United States during the territorial period are not lightly to be inferred and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.” From 1) the time Fort Lincoln was established as an infantry and cavalry post in 1872-73 (primarily to protect the surveyors that were

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<sup>85</sup> 403 U.S. 9 (1971).

<sup>86</sup> 403 U.S. at 197-98 (quoting *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926)) (internal quotations omitted). See also *Montana v. United States*, 450 U.S. 544, 552 (1981) discussed later in this memorandum.

surveying the tracts of land on each side of the proposed railroad right-of-way to allow homesteading and to fund the building of the right-of-way as well as grow the population of the territory enough to meet the population thresholds for Dakota Territory to become one or more States, to the time 2) when Fort Lincoln was abandoned in 1891 after the Historic Bridge between Bismarck and Mandan was completed and the last miles of track were finished in Montana. During that whole time, and for more than a decade afterwards, the “Port of Bismarck” on the eastern bank of the Missouri River just below the Historic Bridge was the principal place where goods and people embarked on steamboats to the interior plains close to the river between Bismarck and the Rocky Mountains and points beyond.

Ownership of this important historical port located just below the Historic Bridge was reserved for the settlers of the future States of North Dakota and Montana under the Public Trust Doctrine, then granted to North Dakota when it became a State. Transfer to the railroad, under the 1864 Act, of anything more than a right-of-way easement “*should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.*” (Emphasis supplied.) There is no such language in the 1864 Act.

Further, the Public Trust Doctrine was well established black letter law in 1864. There is no language in the 1864 Act that references this commonly understood black letter law, or that transfers, explicitly or implicitly, the land below the Historic Bridge.

Nor does the 1864 Act show any intent to transfer to the railroad the key shoreline along the Missouri River that was to become the Port of Bismarck. The railroad did build a track down to the Missouri River to unload goods onto the steamboats (see photographs from the Archives below); but building the right-of-way and laying track to the edge of the shoreline did not convert ownership of the riverbed up to the ordinary high-water mark to the railroad. In fact, that would have defeated the whole purpose of bringing the railroad right-of-way to Bismarck at that time. The port of Bismarck became the central distribution point of goods and people through the Port of Bismarck below the Historic Bridge to much of the Upper Great Plains along the Missouri River and its tributaries. There is no such declaration in the 1864 Act that transferred to the railroad any ownership of the land which was to become the Port of Bismarck, or the bed of the Missouri River where the Historic Bridge was yet to be located.

- Third, to infer that the intent under the 1864 Act was to transfer the shoreline below the Historic Bridge (that was to become the Port of Bismarck) to the railroad under language of the 1864 Act, “[a] court deciding a question of title to the bed of a navigable water must ... begin with a strong presumption against conveyance by the United States, and must not infer such a conveyance unless the intention was definitely declared or otherwise made very plain, or was rendered in clear and especial words, or unless the claim confirmed in terms embraces the land under the waters of the stream.” There is no language in the 1864 that overcomes this strong presumption.
  - The intention to override the Public Trust Doctrine through the 1864 Act was *not* “definitely declared or otherwise made very plain” in the Act.

- The intention to override the Public Trust Doctrine through the 1864 Act was *not* “rendered in clear and especial words” in the Act.
- The intention to override the Public Trust Doctrine through the 1864 Act was *not* “confirmed in terms [that] embrace[d] the land under the waters of” the Missouri River below the location of the Historic Bridge, or the shorelines below the Historic Bridge, where the Ports of Bismarck and Mandan were located on each side of the river, and connected by a ferry (from where the stagecoaches, among other things, would depart). See the historic photographs from the National, State, and local archives below that show all these facts.

The “strong presumption against conveyance by the United States” of the waterway beds and shorelines of navigable waters in the territories of the United States, before those territories became States, is not overcome by the language in the 1864 Act. This strong presumption against transfer of property reserved for future States under the Public Trust Doctrine is restated in numerous other cases, for example: *Montana v. United States*, 450 U.S. 544, 552 (1981) (ruling that Montana owned the bed of the Big Horn River within the exterior boundaries of the Crow Tribe Reservation); *United States v. Holt State Bank*, 270 U.S. 49, 57-59 (1926) (ruling that Minnesota owned title to the bed of Mud lake within the Red Lake Indian Reservation); *Summa Corp. v. California ex rel. State Lands Comm'n.*, 466 U.S. 198, 205 (1984) (“[An ordinary federal patent purporting to convey tidelands located within a State to a private individual is invalid, since the United States holds such tidelands only in trust for the State.”); *United States v. Aranson*, 696 F.2d 654, 664-66 (9th Cir. 1983) (ruling that the easterly half of the Colorado River bed had not been conveyed as part of the Colorado River Indian Reservation), cert. denied, 469 U.S. 982 (1983); *Skokomish Indian Tribe v. France*, 320 F.2d 205 (9th Cir. 1963) (concluding that tidelands adjacent to Skokomish tribe's reservation had passed to the State of Washington), cert. denied, 376 U.S. 943 (1964); *Taylor v. United States* 44 F.2d 531, 536 (9th Cir. 1930) (holding that the Presidential order setting aside for the Quileute Indian tribe land bordering on navigable river did not reserve submerged lands), cert. denied, 283 U.S. 820 (1931); *Wisconsin v. Baker*, 524 F. Supp. 726, 734 (W.D. Wis. 1981) (rejecting tribal claim to regulate hunting and fishing in navigable waters lying within the exterior boundaries of the Lac Courte Oreilles Reservation), modified by 698 F.2d 1323 (7th Cir. 1983), cert. denied, 463 U.S. 1207 (1983); and *Massachusetts v. New York*, 271 U.S. 65, 89 (1926) (concluding that “grants [of soil under navigable waters] are peculiarly subject to the rule, applicable generally, that all grants by or to a sovereign government, as distinguished from private grants, must be construed so as to diminish the public rights of the sovereign only so far as is made necessary by an *unavoidable construction*”) (emphasis supplied; citations omitted).

There is no “unavoidable construction” of the 1864 Act that overcomes the strong presumption *against* reading into the Act an intent to transfer the bed of the Missouri River below the Historic Bridge to the railroad; rather, under the Public Trust and Equal Footing Doctrines, the riverbed continued to be held in trust for North Dakota until statehood.

The cases that BNSF cites in its March 11, 2022, memorandum – *Montana v. United States*, 450 U.S. 544, 555 (1981); *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) – are all distinguishable from this case. Nothing in the 1864 Act had any language whatsoever that reserved submerged lands or dealt with the Public Trust Doctrine, which had been established black letter law for two decades. The fact that Congress can reserve such interests is overcome by the fact that, in the 1864 Act, Congress did not make any such reservation or extinguishment of riverbeds and shorelines reserved in trust for future States under the Public Trust Doctrine. Without express language in the 1864 Act expressing such intent, no such interest was reserved.

In summary, when the Public Trust and Equal Footing Doctrines are construed together with the language of the 1864 Act, the only reasonable construction that gives effect to each is that the riverbed below the Historic Bridge was held in trust for the State, then transferred to North Dakota at statehood; the interest given to the railroad under the 1864 Act was, as discussed by Darwin Roberts in his law review below, the same special kind of right-of-way easement given to all other railroads under previous and subsequent Acts creating railroads. Darwin Roberts' review largely deals with who, among the federal government, the railroad, and private landowners (but not the State under the Public Trust Doctrine), owns abandoned rail lines. Nevertheless, Roberts' review describes and summarizes the type of ownership given to railroads in all federal laws creating railroads from the 1830s on, which is the equivalent of a right-of-way easement. Just as there is an easement under the common law for navigation over the waterways, and over sidewalks for pedestrians, a similar easement was created by Congress for railroads beginning in the 1830s over the territorial lands of the western United States to build the railways that gradually displaced the primary role that waterways had played (over decades) for transport of goods and people in interstate commerce.

Thus, Roberts notes that, beginning in the 1830s, Congress granted railroads thousands of miles of rights-of-way across territories of the western United States and other public lands. Those rights-of-way, however, were consistently granted in language that created the equivalent of an easement that neither extinguished federal ownership of the land subject to that right-of-way, nor changed state ownership of riverbeds up to the ordinary high-water mark under the Equal Footing and Public Trust Doctrines when a new State was admitted into the Union.

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 subsidies.<sup>87</sup>

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<sup>87</sup> 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).



Later in his review of the case law and statutory enactments of Congress relating to railroad rights-of-way, Darwin continues:

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 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.<sup>88</sup>

In summary, as noted above, the overwhelming weight of the precedent and case law shows that the Historic Bridge was held in trust for the State, then transferred to North Dakota at statehood; the interest given to the railroad under the 1864 Act was the same special kind of right-of-way easement given to all other railroads under previous and subsequent Acts creating railroads. This is confirmed by the language of the 1864 Act and the cases cited in BNSF, in its March 11, 2022, memorandum:

- The first case BNSF cites in its March 11<sup>th</sup> memorandum is *Northern Pac. Ry. Co. v. Townsend*, 190 U.S. 267 (1903), which is both irrelevant and inapposite to the issues raised in this case for several reasons:

The facts of *Townsend* show that it involves an issue of adverse possession involving 1) a patent issued to a homesteader under the 1862 Homestead Act versus 2) land within 10 miles of the railroad right-of-way which the railroad had in *Townsend* that the railroad had “acquired ... by purchase at a sale under foreclosure of certain mortgages under section 3 of the 1864 Act.” The land in question was part of the land which, under Section 3 of the 1864 Act, “created a large land grant to secure the construction and continuous maintenance of the road.” *Townsend*, supra, 190 U.S. at 267-68. The four-hundred-foot-wide right-of-way was built through land that the homesteader had received by patent under the Homestead Act. The Court in *Townsend* stated that the issue was “whether an individual, for private purposes may, by adverse possession, under a state statute of limitations, acquire title to a portion of the right of way granted by the United States for the use of this railroad.” 190 U.S. at 270. This is not an issue of fact or law raised regarding the historic 1883 bridge between Bismarck and Mandan.

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<sup>88</sup> Darwin P. Roberts, supra, *The Legal History of Federally Granted Railroad Rights-of-Way and the Myth of Congress’s “1871 Shift,”* 82 Colo. Law Rev. at 149-50.

Based on the facts and law discussed in *Townsend*, it clearly does not involve the issue of ownership of a riverbed of a navigable river at a railroad crossing, the State or the railroad, which is the issue raised in this case regarding the Historic Bridge. Thus, *Townsend* is distinguishable on both the facts and the issues of law raised by the Historic Bridge crossing, making *Townsend* both irrelevant and inapposite to the issues raised in this case – which involve ownership of the riverbed beneath the historic 1883 bridge between Bismarck and Mandan, as well as the bridge itself, under the Equal Footing and Public Trust Doctrines versus the 1864 Act as addressed in detail in FORB’s memorandum above.

- BNSF’s March 11<sup>th</sup> memorandum also cites, and highlights language quoted in *Townsend*, 190 U.S. at 190, from Section 2 of the 1864 Act. Section 2 of the 1864 Act “grant[s] to said Northern Pacific Railroad Company, its successors and assigns” “the ***right of way through the public lands*** ... for the construction of a railroad and telegraph as proposed; and the right, power, and authority ... to take from the public lands, adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof.” (Emphasis supplied.) This language, on its face, grants only a “***right of way through the public lands*** ... for the construction of a railroad” plus “the right ... to take from the public lands, adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof.” That is, as discussed in Roberts’ law review above, what the Northern Pacific received under Section 2 of the 1864 Act was a “***right of way through the public lands***,” not ownership of the underlying land, plus “the right ... to take material of earth, stone, timber, and so forth, for the construction thereof.” This actually supports FORB’s position in this case, which is that BNSF under the 1864 Act owns only a right-of-way easement, not the riverbed up to the ordinary high-water mark, or the bridge itself.
- BNSF’s March 11<sup>th</sup> memorandum also cites and highlights language from Section 7 of the 1864 Act dealing with “Eminent Domain.” It is elementary that “[e]minent domain is the right of the people or government to take ***private property*** for public use.”<sup>89</sup> The construction of the Historic Bridge between Bismarck and Mandan did not involve taking private property by eminent domain, but rather navigable territorial waters owned by the United States that were reserved for North Dakota under the Public Trust and Equal Footing Doctrine, and then transferred to North Dakota at the time of statehood. Thus, Section 7 of the 1864 Act, which involves taking private property through eminent domain, is irrelevant to the issue of ownership of the Historic Bridge.
- BNSF has no “patent” showing original title for the riverbed up to the ordinary high-water mark for river crossing under the Historical Bridge between Bismarck and Mandan. All BNSF has is the language of Section 2 of the 1864 Act, which, by its plain terms, grants to the Northern Pacific, and BNSF as Northern Pacific’s successor, only a mere “***right of way through the public lands*** ... for the construction of a railroad” plus “the right ... to take from the public lands, adjacent to the line of said road, material of

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<sup>89</sup> See, e.g., <https://thelawdictionary.org/?s=eminent+domain>

earth, stone, timber, and so forth, for the construction thereof.” In BNSF’s March 11<sup>th</sup> memorandum, BNSF tries to “bootstrap” itself out of this lack of a document showing any original title by citing language from *St. Paul & P.R. Co. v. Northern Pac. R.R. Co.*, 139 U.S. 1, at 6 (1891) and *Northern Pac. R.R. Co v. Walker*, 47 F. 681, 682–83 (C.C.N.D. 1891), that it can rely on “would be evidence (emphasis by BNSF) 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.”

BNSF also suggests that evidence of how the property was surveyed is evidence that BNSF owns the Historic Bridge crossing; but BNSF has in hand no patent from the U.S. government, or any deed or condemnation judgment secured through eminent domain through the railroad’s ability to take private property by means of the eminent domain process, because they do not exist for the Historic Bridge. BNSF tries to ignore and fails to address in its memorandum either the Public Trust or the Equal Footing Doctrine, each of which apply to riverbeds of navigable territorial waters up to the ordinary high-water mark. Under those doctrines, the riverbed of a navigable territorial water, such as the Missouri River below the Historic Bridge, was held by the United States in trust for North Dakota until it became a State, then transferred by the United States to North Dakota at the time of statehood on November 2, 1889.

Further, the special rules of construction that apply to the Historic Bridge in this case under the Equal footing and Public Trust Doctrines, as set forth and developed in *Martin v. Waddell's Lessee*, *Shively v. Bowlby*, *Utah v. United States* – and the numerous other Public Trust doctrine cases (cited and discussed in detail above) that apply to ownership of the beds of navigable territorial waters of the United States – clearly show that the State of North Dakota owns the riverbed and attached fixtures under the Historic Bridge up to the ordinary high-water mark in 1889, and BNSF owns only a mere “**right of way through the public lands** ... for the construction of a railroad” plus “the right ... to take from the public lands, adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof.” That is what the evidence shows in this case.

- Next, in Section 1.C. of BNSF’s March 11<sup>th</sup> memorandum, BNSF claims ownership under the surveying process that occurred at the Historic Bridge before it was built. For the reasons discussed in the bullet above, mere surveying of the bridge crossing does not give BNSF any ownership of the Historic Bridge. Again, under the special rules of construction that apply to the Historic Bridge under the Equal footing and Public Trust Doctrines, as set forth and developed in *Martin v. Waddell's Lessee*, *Shively v. Bowlby*, *Utah v. United States*, and the numerous other Public Trust doctrine cases (cited and discussed in detail above) that apply to ownership of the beds of navigable territorial waters of the United States, the State of North Dakota owns the riverbed and attached fixtures under the Historic Bridge up to the ordinary high-water mark in 1889, and BNSF owns only a mere “**right of way through the public lands** ... for the construction of a railroad” plus “the right ... to take from the public lands, adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof.”

- Next, in Section 1.D. of BNSF’s March 11<sup>th</sup> memorandum, BNSF claims that “The 1864 Act of Congress Conferred Upon Northern Pacific Railroad a Right to Build and Maintain Bridges Across Navigable Waterways.” As the plain language of this heading states, all that the 1864 Act gave to the Northern Pacific, and BNSF as its successor, was a mere “**Right to Build and Maintain Bridges Across Navigable Waterways**” – not ownership of the navigable waterway or the bridge itself. As *Union Pac. R.R. Co. v. Hall*, 91 U.S. 343, 352 (1875), as cited by BNSF, states:

“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.”

Again, FORB does not contest that the Historic Bridge “is a part of [BNSF’s] railroad . . . [or, that BNSF’s railroad is] required by law to be so operated [as a railroad].” Northern Pacific, and BNSF as its successor, have an easement to maintain and operate BNSF’s railroad over the Historic Bridge – but it does not follow that BNSF owns either the riverbed beneath the bridge or the bridge itself (see the more easily understood analogy above discussing the easement pedestrians have to walk over a sidewalk owned by the owner of the adjacent house). Again, it is not true, and it does not follow, that the Northern Pacific, or BNSF as its successor, owned or own the riverbed beneath the Historic Bridge or the Bridge itself for the reasons discussed throughout FORB’s memorandum.

Thus, BNSF owns only a mere “***right of way through the public lands*** . . . for the construction of a railroad” plus “the right . . . to take from the public lands, adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof,” plus a right to operate and maintain the Historic Bridge as “a part of their railroad.” Ownership of the riverbed beneath the Historic Bridge, as well as the bridge as a fixture attached to it, however, is held by the people of the State of North Dakota, under the special rules of construction that apply to the Historic Bridge under the Equal footing and Public Trust Doctrines, as set forth and developed in *Martin v. Waddell’s Lessee*, *Shively v. Bowlby*, *Utah v. United States*, and the numerous other Public Trust doctrine cases (cited and discussed in detail above) that apply to ownership of the beds of navigable territorial waters of the United States, as passed to North Dakota at statehood on November 2, 1889.

The same analysis applies to *Hughes v. Northern Pac. Ry. Co.*, 18 F. 106, 114–15 (C.C.Or. 1883) and *Northern Pacific Railroad Co. v. Walker*, 47 F. 681, 685 (C.C.N.D. 1891): BNSF owns only a mere “***right of way through the public lands***” plus a “**Right to Build and Maintain Bridges Across Navigable Waterways**”; it does not follow that BNSF owns the riverbed beneath the Historic Bridge or the bridge itself. Under the rules of construction set forth in *Martin v. Waddell’s Lessee*, *Shively v. Bowlby*, *Utah v. United*

*States*, and the numerous other Public Trust doctrine cases (cited and discussed in detail above), both the riverbed beneath the Historic Bridge and the bridge itself belong to the people of the State of North Dakota.

Finally, BNSF cites *Northern Pacific Railroad Co. v. Carland*, 3 P. 134, 138–39 (Mont. Terr. 1884), which “discuss[es] the exemption of Northern Pacific’s right of way from taxation” under the 1864 Act, as evidence that it owns the property beneath the right-of-way easement. *Northern Pacific Railroad Co. v. Carland* is distinguishable under both its law and its facts from this case involving ownership of the Historic Bridge under the Equal Footing and Public Trust Doctrines. *Northern Pacific Railroad Co. v. Carland* deals with the issue of whether the right-of-way of the railroad in Montana Territory can be taxed by the Territory of Montana. It concludes, under Montana Territory tax law, that it can be. *Northern Pacific Railroad Co. v. Carland* does not address the issue of ownership of the riverbed up to its high-water mark and the bridge as a fixture attached to that property under the Equal Footing and Public Trust Doctrines – which are the issues we are addressing with regard to the historic 1883 bridge between Bismarck and Mandan. In 1884, the riverbeds beneath the Missouri River in Montana were still being held in trust under the Public Trust Doctrine for when Montana became a State in 1889, the same time as North Dakota. And, like North Dakota, those riverbeds and any fixtures attached to them in 1889 became the property of the people of Montana at the time of Montana’s statehood on November 8, 1889, six days after North Dakota.

Thus, *Northern Pacific Railroad Co. v. Carland* is irrelevant to and distinguishable from this case involving the Historic Bridge for two reasons: 1) it involves ownership of the right-of-way under territorial tax law, rather than territorial real estate law, which can be different (for example, the holder of a contract for deed may have to pay the real estate taxes, even though that holder does not yet have legal title); and 2) it does not raise or address the issue of ownership of the riverbed under navigable territorial waters, which in 1884 in Montana Territory was being held in trust by the United States under the Public Trust Doctrine for when Montana achieved statehood on November 8, 1889. Thus, its relevance to the dispute over ownership of the Historic Bridge between Bismarck and Mandan is very limited, if not totally irrelevant.

- Next, in Section 1.E. of BNSF’s March 11<sup>th</sup> memorandum, BNSF claims that **“BNSF Has Maintained its Ownership Interest in the Bismarck Bridge Through Its Continued Use of the Structure.”**

First, as discussed throughout FORB’s memorandum, the “ownership interest” that BNSF has in the riverbed beneath the Historic Bridge, and the bridge itself, is a “right-of-way easement” that allows it to operate and maintain its railway over the Historic Bridge, but under which BNSF does not own either the riverbed beneath the Historic Bridge, or the bridge itself. For the reasons discussed throughout this memorandum, ownership of the riverbed beneath the Historic Bridge and the bridge itself passed to the people of the State of North Dakota upon statehood on November 2, 1889.

Second, it is true that “[t]he right-of-way grant made by the 1864 Act has ... [in some cases] been described as a limited fee upon an implied condition of reverter.” See *Townsend*, 190 U. S. at 271, and the two other cases cited by BNSF (one just in a footnote as dicta). This language describing the “ownership interest” held by BNSF – “a limited fee upon an implied condition of reverter” – is just a convoluted and confusing way of saying that what was granted to the Northern Pacific under Section 2 of the 1864 Act was a mere “**right of way through the public lands** ... for the construction of a railroad” plus “the right ... to take from the public lands, adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof,” plus a right to operate and maintain the Historic Bridge as “a part of their railroad.” Another way of putting it is this language means that Northern Pacific received a right-of-way easement that the United States could cancel upon certain conditions. Either way, this special limited transfer of a right-of-way interest does not give BNSF ownership of the underlying riverbed or the bridge itself.

Third, *Townsend*, 190 U. S. at 271, is, as discussed above, an “adverse possession” case brought by the railroad against a private landowner who had acquired what he thought was valid title under the Homestead Act, but which the U.S. Supreme Court, in overturning a decision by the Minnesota Supreme Court, determined that the foreclosed mortgage the railroad had “acquired ... by purchase at a sale under foreclosure of certain mortgages under section 3 of the 1864 Act” gave it superior title to the adverse possession claim by the homesteader. (See discussion of the facts of *Townsend* above.)

The State of North Dakota is not a private landowner as in *Townsend*. Nor is North Dakota the one claiming ownership by adverse possession. Rather, North Dakota became the owner at the time of statehood under the Equal Footing and Public Trust Doctrines for the reasons set forth in detail above in discussing *Martin v. Waddell's Lessee* and *Pollard v. Hagan*, under which the United States had no right at all “to transfer to a citizen the title to the shores and the soils under the navigable waters,”<sup>90</sup> and under which “[t]he right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case,”<sup>91</sup> i.e., in this case, the land under navigable waters up to the ordinary high-water mark beneath the historic 1883 bridge between Bismarck and Mandan. “[T]he shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively.”<sup>92</sup> In 1977, the United States Supreme Court made this clear in *Oregon v. Corvallis Sand and Gravel Co.*:

Our analysis today leads us to conclude that our decision to apply federal common law in *Bonelli* was incorrect .... Although federal law may fix the initial boundary between fast lands and the riverbeds at the time of admission to the Union, the State's title to the riverbed vests absolutely as

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<sup>90</sup> 44 U.S. at 230.

<sup>91</sup> 44 U.S. at 230.

<sup>92</sup> 44 U.S. at 230.



of the time of a State's admission and is not subject to later defeasance by operation of any doctrine of federal common law.<sup>93</sup>...

Once the equal footing doctrine had vested title to the riverbed in Arizona as of the time of its admission to the Union, the force of that doctrine was spent; it did not operate after that date to determine what effect on titles the movement of the river might have. Our error, as we now see it, was to view the equal footing doctrine enunciated in *Pollard's Lessee v. Hagan* as a basis upon which federal common law could supersede state law in the determination of land titles. Precisely the contrary is true.<sup>94</sup>

Thus, the issue in this case with regard to adverse possession is whether the Northern Pacific and BNSF acquired ownership of the Historic Bridge by adverse possession through use of the 1883 bridge as a railway for the last 139 years. The answer to that question is clear under North Dakota law.

The most fundamental law in North Dakota, its Constitution, does not allow adverse possession against the State:

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.

The State Constitution for North Dakota was subject to significant influence from the Northern Pacific when it was drafted in 1889. See Robert Vogel, *Sources of the 1889 North Dakota Constitution*, 65 N.D. Law Rev. 331 (1989). 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, N.D. State Const. Art. IX, Sec. 9, prohibits North Dakota's legislature from diminishing or extinguishing such interests, and, as shown by the highlighted language above, does not allow adverse possession against the State of North Dakota.

In summary, nothing in the 1864 Act by Congress that created the Northern Pacific 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 held in trust by the United States until it was transferred to North

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<sup>93</sup> 429 U.S. 363, 370-71 (1977).

<sup>94</sup> 429 U.S. at 371.

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).

As noted by BNSF at the beginning of its March 11, 2022, memorandum, 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).” This language did not extinguish the future interest of North Dakota in the navigable territorial waters up to its ordinary high-water mark beneath the Historic Bridge, which were held in trust under the Public Trust Doctrine until statehood, then transferred to North Dakota when it became a State on November 2, 1889.

- Finally, in Section 4 of BNSF’s March 11<sup>th</sup> memorandum, BNSF claims “Any Action to Divest BNSF of Title to the Bismarck Bridge Would Be Barred By the Equitable Defense of Laches.” This action is not trying to divest BNSF of any title, but rather to recognize and enforce the title to the riverbed below the Historic Bridge, and the bridge itself, that was transferred to North Dakota at Statehood.

If there was any “laches,” it was on the failure on the part of the Northern Pacific, and BNSF as its successor, to address ownership of the riverbed and shoreline of the Missouri River for the reasons discussed at the beginning of this memorandum, because the Equal Footing and Public Trust Doctrines were long-established black letter law when the 1864 Act was enacted by Congress. By failing to address the Equal Footing and Public Trust Doctrines as set forth in this memorandum, the railroad has been guilty of laches by not addressing the ownership issues raised by those doctrines from the time the 1864 Act was written, through the current application by BNSF to get a permit from USCG to destroy the Historic Bridge, with hardly a nod to the bridge’s history and importance as an historical landmark, for example:

- The proponents of the 1864 Act that created the Northern Pacific were guilty of laches when they ignored the long-established Equal Footing and Public Trust Doctrines when they went to Congress and secured passage of the 1864 Act without addressing the issue of ownership of the riverbeds that the railroad right-of-way would cross.
- The Northern Pacific was guilty of laches when it surveyed (in Dakota territory, under the protection of Lt. Colonel Custer and the U.S. Army troops stationed at Fort Lincoln) the crossing at the Missouri River, and all other river crossings over navigable rivers in Dakota Territory further west, again without addressing the issue of ownership of the riverbeds that the railroad right-of-way would cross.
- The Northern Pacific again was guilty of laches when it ignored it constructed the 1883 Northern Pacific Railway Bridge between Bismarck and Mandan without first establishing that the railroad owned the Historic Bridge on a riverbed whose ownership was reserved to a future state under the Public Trust and Equal Footing Doctrines.
- And BNSF is again guilty of laches by attempting to destroy the historic 1883 Northern Pacific Railway Bridge as its own personal property, without first addressing the issue of whether BNSF owned the bridge, and without having to

comply with and pay for the costs to “avoid, minimize, and mitigate” the impacts of the proposed project on the Historic Bridge, as required of the project proponent under NHPA and its implementing regulations.

Finally, in its March 11, 2022, memorandum, BNSF fails to acknowledge and address the primary issue raised by FORB in FORB’s February 8<sup>th</sup> memorandum and follow up letters to USCG. BNSF ignores and fails to address the Public Trust and Equal Footing Doctrines in its March 11<sup>th</sup> memorandum, apparently hoping that no one would notice. Those doctrines, however, were the means by which title and ownership of the Historic Bridge passed to North Dakota at statehood. All of BNSF’s March 11<sup>th</sup> memo, and cases and laws cited therein, are essentially irrelevant and inapposite because they do not address the central issue raised by FORB, which is, whether the Equal Footing and Public Trust Doctrines transferred ownership of the riverbed beneath the Historic Bridge, and the bridge itself, to North Dakota at the time of Statehood. FORB’s response in this memorandum has addressed the issues BNSF raised in its March 11<sup>th</sup> memorandum. But BNSF has yet to acknowledge and address the Equal Footing and Public Trust Doctrines, and whether under their plain language, and the rules of construction that apply to them, ownership of the Historic Bridge was transferred to North Dakota on November 2, 1889.

In summary, North Dakota became the owner of the riverbed beneath the Historic Bridge, and the Bridge itself, at statehood. As Stated in Section 2 of the 1864 Act, the railroad was granted only a “*right of way through the public lands* ... for the construction of a railroad” plus “the right ... to take from the public lands, adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof,” plus a right to operate and maintain the Historic Bridge and the rest of its right-of-way as “a part of their railroad.” As stated in *Oregon v. Corvallis Sand and Gravel Co.* discussed above, “the State's title to the riverbed vests absolutely as of the time of a State's admission and is not subject to later defeasance by operation of any doctrine of federal common law.”<sup>95</sup>

**2.2 The evidence is overwhelming that all four piers of the Historic Bridge, as well as the embankment west of the Historic Bridge, all were within the riverbed of the Missouri river up to its ordinary high-water mark when North Dakota became a State in 1889. Thus, they were transferred as fixtures attached to the land when North Dakota became a State on November 2, 1889.**

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. As noted in *Oregon v. Corvallis Sand and Gravel Co.*:

Once the equal footing doctrine had vested title to the riverbed [of a State] as of the time of its admission to the Union, the force of that doctrine was spent; it did not operate after that date to determine what effect on titles the movement of the river might have.<sup>96</sup>

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<sup>95</sup> 429 U.S. at 370-71.

<sup>96</sup> 429 U.S. at 371.

Thus, State law determines ownership of the bed of a river and its shorelines, and anything affixed to it as a fixture, after North Dakota was admitted to the Union.

The following provisions of the North Dakota Century Code are the law that applies to the transfer of fixtures to the land, and thus to the Historic Bridge, after statehood. Further, all of the provisions of the North Dakota Century Code are consistent with federal and state common law and territorial law when North Dakota achieved statehood on November 2, 1889.

- NDCC § 47-01-02 divides all property into two categories: “Property is: 1. Real or immovable; or 2. Personal or movable.”
- NDCC § 47-01-03 defines “real property”: “Real or immovable property consists of:
  1. Land;
  2. That which is affixed to land...;
  3. That which is incidental or appurtenant to land; and
  4. That which is immovable by law.
- NDCC § 47-01-04 defines “Land” as “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, as well as the embankment west of the 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 was attached to FORB’s February 8<sup>th</sup> memorandum to USCG. The last photograph in Ed Murphy’s 1995 article shows, with the long white dashes west of the river, where the western ordinary high-water shoreline of the bridge and embankment were in the 1880s (Figure 12).



Figure 12: Aerial Photograph of the Missouri River, Taken Looking North Towards the Historic Bridge. White Lines Mark the Western Ordinary High-Water Line in the 1880s (taken from Murphy 1995:19; Photo Courtesy of North Dakota Geologic Survey).

Murphy writes of this photograph (Figure 12):

Recent photo [in 1995] looking north along the Missouri River to the Bismarck Railroad Bridge, with the Grant Marsh Bridge on I-94 in the background. The line of long dashes outlines the approximate position of the west bank of the Missouri River prior to Morison's dike. The open arrow flower (right) points to the 1951 cut and track realignment; short dashes trace the old track alignment; the solid arrow {center right} points to the city of Bismarck water reservoirs. The line change and landslide work required removing 760,000 cubic yards of soil from this area (Photo courtesy of the North Dakota Geological Survey).

The navigability of the Missouri River at the crossing for the Historic 1883 Northern Pacific Railway Bridge should be an uncontested issue of fact. As discussed in detail earlier in this memorandum, it is documented, for example, in Lewis & Clark's Journals for their 1804-06 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 Battle of 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, including maps and logs of riverboat captains in the North Dakota State Historical Society of North Dakota archives.

All four piers of the Historic Bridge were permanently affixed to the land (river bottom) when 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 1995:8). 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 altered by a dike to build up the riverbed below the ordinary high-water mark of the river before the bridge was constructed (Murphy 1995:6-10). The eastern pier (labeled by Murphy as pier 1) was located on property below the high-water mark that was also regularly flooded.

The 1883 *History of the Northern Pacific Railroad* by Eugene V. Smalley, earlier discussed in this memorandum, provides a comprehensive history of the Northern Pacific from early exploration to completion of the Historic Bridge between Bismarck and Mandan<sup>97</sup> as one of the last steps in finishing the transcontinental railroad. Smalley describes in detail how the Historic Bridge was designed and constructed between 1880-82, including the location of all four piers below the ordinary *low-water* mark of the river:

The bridge proper consists of three through spans, each measuring 400 feet between centres [in original] of end pins, and two approach spans, each 113 feet. It is a high bridge, the bottom cord of the three main spans being placed fifty feet above the level of the highest summer flood, thus giving head room to pass steamboats at all navigable stages of the river. The head room above the extreme high water of 1881 is 42 feet; but this water was an exceptional result of an ice gorge, which necessarily put a stop to all navigation. Practically the bridge gives four feet more head room than many of the bridges on the lower river. The variable channel and the high bluff on the east side were alone sufficient reasons for adopting the high bridge plan in preference to a low bridge with a draw. The violent action of the ice and the excessive height of the ice floods were, however, the controlling elements in the selection of the high bridge plan. The east end of the east approach span is supported by a small abutment of granite masonry, founded on the natural ground of the bluff. The west end of the west approach span is supported by an iron bent resting on two Cushing cylinders, which are supported by piles driven into the sand bar. The three long spans are supported on four granite piers. *Pier 1, the easterly pier, rests on a concrete foundation, the base of which is twenty feet below ordinary low water and sixteen feet below the estimated extreme low water due to ice gorges.* [italics, underlining, and bold type added for emphasis] Piers 2 and 3, which are in the channel of the river, are

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<sup>97</sup> Smalley states that the bridge was "formally opened" on October 21, 1882, with four engines crossing from east to west, followed by eight crossing from west to east, after which a passenger train was sent over. Eugene V. Smalley, *History of the Northern Pacific Railroad*, G.P. Putnam's Son's (New York 1883), p. 394.

founded on pneumatic caissons, sunk into the underlying clay to the depth of about fifty feet below *ordinary low water* [italics added] and ten feet below the surface of the clay.<sup>98</sup> Pier 4 is situated *on the sand bar on the west side of the river below the protection of the dike*, [italics added] and rests on a foundation of 160 piles, which were driven with a Nasmyth steam hammer.<sup>99</sup>

Emphasis in the above paragraph is placed on the language documenting that Pier 1, the easterly pier, rests not only below the ordinary high-water mark but also below the ordinary low-water mark. There is less historic photographic evidence documenting spring flood levels on Pier 1 in the North Dakota archives (in part because most historic photos at that time were taken from the eastern bluffs of the river). This paragraph shows that all four piers of the historic bridge were not only below the ordinary high-water mark in 1889, but also below the ordinary low-water mark, thus making them unequivocally part of the riverbed transferred to North Dakota on November 2, 1889, under the Equal Footing and Public Trust Doctrines.

The reason all four piers were sunk deep below the ordinary low water marks was to protect them from the erosion and shifting of the river during spring flooding on the Missouri River floodplain between Bismarck and Mandan before the Missouri River mainstem dams were constructed in the 1930s and 1940s (whose purposes included protecting cities like Bismarck and Mandan from often extreme spring flooding along the Missouri and Mississippi Rivers all the way to the Gulf of Mexico). Eugene Smalley describes how a dike was built from the west shore of the Missouri River to attempt to confine the river to the Historic Bridge future location:

The report of July, 1880, proposed to cross the river with a bridge consisting of three spans of 400 feet each, resting on solid piers of granite masonry. A dike was to be built from the west shore to within 1000 feet of the east shore, which is here a high bluff of extremely hard clay, thus confining the river within a width favorable to the maintenance of a fixed channel. The bridge was to be located about 500 feet below the dike, and, to provide for contingencies, was made 200 feet longer than the width of the confined river. This plan of operations was afterward carried out, and the completed work differs in no essential respect from plans contemplated in the report of July, 1880.

The construction of the dike was begun in the fall of 1880. Unfortunately, while waiting for materials, *the main navigable channel of the river moved over to the west shore, and when work was actually begun it was found necessary to leave this channel open for navigation.*<sup>100</sup>

Figure 13 is from the National Archives and shows the Historic Bridge in 1883 shortly after construction was completed.

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<sup>98</sup> Current State Geologist Edward Murphy in his 1995 article on the history of the construction of the bridge refers in some places in his article to this lower harder clay as bedrock. See previous memoranda recently sent to the USCG on this issue. Likely this is just a terminology or labelling issue referring to the same harder layer of clay and sandstone underneath the eastern side of the river at this location. Since the eastern side of the river at this location is also a documented fossil site, it follows that the underlying harder “clay” is likely a fossil bearing rock of some sort.

<sup>99</sup> Smalley, *History of the Northern Pacific Railroad*, at pp. 392-93.

<sup>100</sup> Smalley, *History of the Northern Pacific Railroad*, at pp. 390-91.



Figure 13: Photograph of the Recently Completed Historic Bridge in 1883 with Original Superstructure (Photo Courtesy of the National Archives).

At the bottom of this photograph, and to the east of the easternmost pier of the Historic Bridge, Pier 1, the railroad tracks for loading the riverboats at the Port of Bismarck can be seen. All are clearly below the ordinary high-water mark, and all are obviously fixtures attached to the riverbed that were transferred to North Dakota at statehood on November 2, 1889.

This is confirmed in the following 1887 photograph of the Historic Bridge taken two years before statehood. It shows the passengers and goods being transferred from the Northern Pacific to a steamboat for transport upriver. It also shows that Pier 1 is clearly within the ordinary high-water mark and near the edge of the river in 1887.



Figure 14: 1887 Photograph Showing Transfer of Goods from the Steamboat in Foreground to the Historic Bridge in Background with Pier 1 Within the Ordinary High-Water Mark (Copy of Photograph in Private Collection).

Figure 15 was taken on October 21, 1882, on the date 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 pier within the ordinary high-water mark of the Missouri River.

Figure 16 was also taken on October 21, 1882, while the bridge was being tested, again to see if it could safely bear the weight of eight steam engines. This photo shows that both the westernmost pier and the trestle are both clearly built on the riverbed of the Missouri River below the ordinary high-water mark.

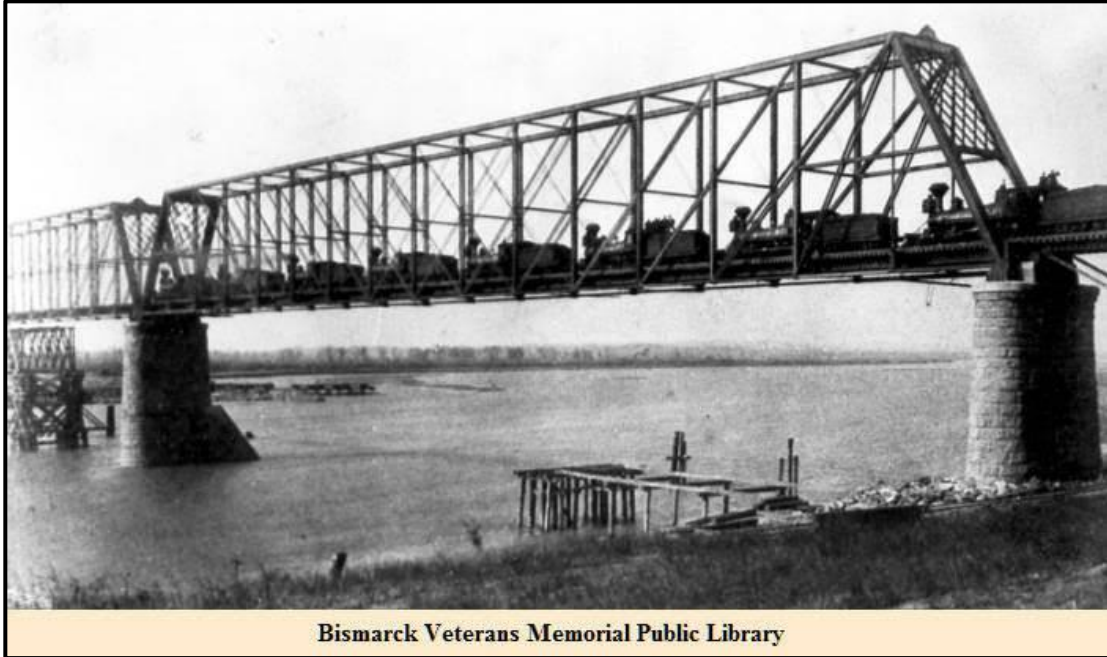


Figure 15: Photograph Taken during Weight Test of Historic Bridge on October 21, 1882, Showing Eastern Pier Within the Ordinary High-Water Mark (Photo Courtesy of Bismarck Veterans Memorial Library).



Figure 16: Photograph Taken during Weight Test of Historic Bridge on October 21, 1882, Showing Western Pier and Trestle Within the Ordinary High-Water Mark (Source Unknown).



Extreme Missouri River flooding during the decades before mainstem dams Fort Peck and Garrison Dam were completed is shown in this 1884 photograph from Murphy's article. It shows that less than a year after bridge construction 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.



Figure 17: Missouri River Flooding in 1884 Inundating All Four Historic Bridge Piers (Taken from Murphy 1995:9).

Like the 1884 photo of Missouri River spring flooding levels from Ed Murphy's 1995 article, the 1887 photo below (Figure 18) shows spring flooding of Missouri River high enough to cover the base of all piers at the high-water mark that year. Again, as discussed in FORB's February 8<sup>th</sup> memorandum and attachments, the relevant factual issue is the ordinary high-water mark, not the extreme high-water mark, defines the bed of the Missouri River at the time North Dakota became a State. But the two instances of flooding within 5 years before statehood is additional evidence. This, combined with the other photographs and other evidence cited above, definitively document that the ordinary high-water mark at the time of Statehood (November 2, 1889) included all four piers and the trestle on the western side of the Missouri River at the Historic Bridge crossing.

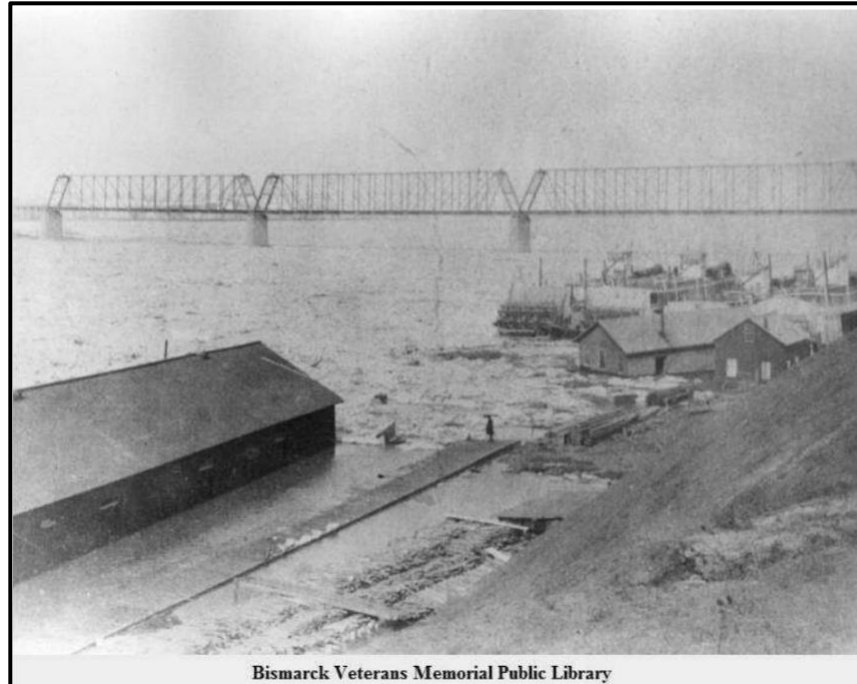


Figure 18: Photograph Taken in 1887 of Missouri River Flooding at the Historic Bridge, Looking North (Courtesy of Bismarck Veterans Memorial Public Library).

In summary, the evidence is clear and overwhelming that the bed of the Missouri River up to the ordinary high-water mark was very wide and continually shifting when the Historic Bridge was constructed. It includes not only the four piers of the Historic Bridge but also the embankment and embedded wooden trestle west of the historic bridge up to the point of the ordinary high-water mark. Under federal common law, the law of Dakota Territory, and the statutes and case law of North Dakota, all of these fixtures attached to the riverbed up to its ordinary high-water mark were transferred as permanent fixtures attached to the land under the Public Trust and Equal Footing Doctrines when North Dakota became a State on November 2, 1889.

For the same reason, North Dakota continues to own both the Historic Bridge, the embankment west of the Historic Bridge, and the land north of the Historic Bridge and west of the river as shown in the 1995 photograph from the Murphy article above. Again,

[a]lthough federal law may fix the initial boundary between fast lands and the riverbeds at the time of admission to the Union, the State's title to the riverbed vests absolutely as of the time of a State's admission and is not subject to later defeasance by operation of any doctrine of federal common law.<sup>101</sup>

### **2.3 When considering whether to grant a permit to destroy the Historic Bridge, the history of the bridge in the context of other Acts of Congress enacted during the Civil War for the same purpose, as well as the history of the bridge as it fits in with**

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<sup>101</sup> 429 U.S. at 370-71.

**the history of the rest of the transcontinental railroad built under the 1864 Act must also be considered.**

The 1864 Act must be construed with the two other intertwined laws enacted by Congress during the Civil War 1) to bind the country together with transcontinental railways and telegraph lines crossing the whole of the western territories of the United States and 2) to encourage homesteaders to settle the unsettled areas in between. The three Acts are:

- 1) the Homestead Act of 1862;<sup>102</sup>
- 2) the Pacific Railway Act of 1862<sup>103</sup> that allowed construction of the first transcontinental railroad and telegraph between Omaha, Nebraska, and Sacramento, California, from 1862-69; and
- 3) the 1864 Act<sup>104</sup> that created the Northern Pacific and allowed construction of the second transcontinental railroad between Duluth, Minnesota, and two ports near present day Seattle, Washington and Portland, Oregon, that was supposed to be completed from 1864-1872, but which was not completed until 1883 (with completion of the 1883 Northern Pacific Railway Bridge between Bismarck and Mandan as one of its final major steps).<sup>105</sup>

The general rules of statutory construction that apply under North Dakota law and federal law are well established for interpreting any ambiguities in the 1864 Act not addressed in the analysis above. “If a statute is ambiguous, the court, in determining the intention of the legislation, may consider among other matters: ... The consequences of a particular construction.”<sup>106</sup> The Historic Bridge is deeply tied to the history of the Mandan-Bismarck community, the region of North Dakota where it is located, and the United States. Therefore, the consequences of the particular construction that the railroad has given to the 1864 Act throughout its 160-year history is relevant to how the 1864 Act should be interpreted in this case. The Historic Bridge is a structure of national historic significance for the reasons discussed throughout this memorandum.

It is useful to summarize the Homestead Act and the Act that recreated the Union Pacific Railroad in 1862, to understand how those two Acts compare to, and fit in with, the 1864 Act.

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<sup>102</sup> Act of May 20, 1862 (Homestead Act), Public Law 37-64 (12 STAT 392); 5/20/1862; Enrolled Acts and Resolutions of Congress, 1789 – 2011. See footnote 14 above.

<sup>103</sup> Act of July 1, 1862 (Pacific Railroad Act), 12 STAT 489, which established the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean.; 7/1/1862; Enrolled Acts and Resolutions of Congress, 1789 – 2011. See footnote 15 above.

<sup>104</sup> Act of July 2, 1864 (13 Stat. at L. 365, chap. 217) again, referred to throughout this memorandum, as the 1864 Act. See footnote 16 above.

<sup>105</sup> Again, as noted at footnote 17 above, chapter XLIII of Eugene V. Smalley’s *History of the Northern Pacific Railroad*, published in 1883, supra, footnote 4, is almost entirely devoted to the construction of the historic Northern Pacific Railway Bridge between Bismarck and Mandan at issue in this case as the final major step in completing the second transcontinental railroad across the United States in 1883, eleven years past the statutory deadline set by the 1864 Act. See Smalley, supra, pp. 388-97.

<sup>106</sup> NDCC § 1-02-39.

The National Archives has a useful and concise summary of the Homestead Act of 1862:

Passed on May 20, 1862, the Homestead Act accelerated the settlement of the western territory by granting adult heads of families 160 acres of surveyed public land for a minimal filing fee and five years of continuous residence on that land.

The Homestead Act, enacted during the Civil War in 1862, provided that any adult citizen, or intended citizen, who had never borne arms against the U.S. government could claim 160 acres of surveyed government land. Claimants were required to live on and “improve” their plot by cultivating the land. After five years on the land, the original filer was entitled to the property, free and clear, except for a small registration fee. Title could also be acquired after only a six-month residency and trivial improvements, provided the claimant paid the government \$1.25 per acre. After the Civil War, Union soldiers could deduct the time they had served from the residency requirements.

Although this act was included in the Republican party platform of 1860, support for the idea began decades earlier. Even under the Articles of Confederation, before 1787, the distribution of government lands generated much interest and discussion.

The act, however, proved to be no panacea for poverty. Comparatively few laborers and farmers could afford to build a farm or acquire the necessary tools, seed, and livestock. In the end, most of those who purchased land under the act came from areas quite close to their new homesteads (Iowans moved to Nebraska, Minnesotans to South Dakota, and so on). Unfortunately, the act was framed so ambiguously that it seemed to invite fraud, and early modifications by Congress only compounded the problem. Most of the land went to speculators, cattle owners, miners, loggers, and railroads. Of some 500 million acres dispersed by the General Land Office between 1862 and 1904, only 80 million acres went to homesteaders. Indeed, small farmers acquired more land under the Homestead Act in the 20th century than in the 19th.<sup>107</sup>

The consequences of the 1864 Act, for example, that required the claimant to pay the government \$2.50 per acre, rather than \$1.25 per acre, for both homestead and railroad patents issued for 40 miles on each side of the Northern Pacific right-of-way across Dakota territory then the State of North Dakota was, is one example of the consequences of interpreting the 1864 Act that was devastating to early settlers of Dakota Territory.

The National Archives also have a useful and concise summary of the **Pacific Railway Act of 1862**:

**This act, passed on July 1, 1862, provided Federal subsidies in land and loans for the construction of a transcontinental railroad across the United States.**

The question of "internal improvements" was frequently before Congress in the 19th century: Should Congress assist in improving the country's transportation

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<sup>107</sup> National Archives website, *Homestead Act (1862)*, at <https://www.archives.gov/milestone-documents/homestead-act> (April 3, 2022).

system? One such improvement was the dream of constructing a railroad that would cross the entire country.

In the 1850s, Congress commissioned several topographical surveys across the West to determine the best route for a railroad, but private corporations were reluctant to undertake the task without Federal assistance. In 1862, Congress passed the Pacific Railway Act, which designated the 32nd parallel as the initial transcontinental route, and provided government bonds to fund the project and large grants of lands for rights-of-way. The Act aided in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean and secured the use of that line to the government.

The legislation authorized two railroad companies, the Union Pacific and the Central Pacific, to construct the lines. Beginning in 1863, the Union Pacific, employing more than 8,000 Irish, German, and Italian immigrants, built west from Omaha, NE; the Central Pacific, whose workforce included over 10,000 Chinese laborers, built eastward from Sacramento, CA. Each company faced unprecedented construction problems, severe weather, and conflict with American Indians, whose ancestral lands were transected by the railroads.

On May 10, 1869, the last rails were laid and the last spike was driven in during a ceremony at Promontory, UT. The completion of the transcontinental railroad shortened a journey of several months to about one week. Congress eventually authorized four transcontinental railroads and granted 174 million acres of public lands for rights-of-way.<sup>108</sup>

The fact that the Union Pacific and the Central Pacific Railroads could together build their transcontinental railway in less than half the time and with less than half the land grant than the Northern Pacific under the 1864 Act is telling.

In April of 1924, Congress authorized an investigation into the 1864 and 1870 laws that created and financed the Northern Pacific. The hearings lasted five years and involved dozens of witnesses. The reasons for this 5-year investigation included a determination that while railroad construction between 1864 and 1883 had cost the Northern Pacific \$70 million, sales of the “railroad patents” given to Northern Pacific to transfer to homesteaders to fund the building of the right-of-way and other structures necessary to complete the railroad totaled more than \$136 million, a profit of about \$66 million. See letter from U.S. Department of Agriculture Secretary Wallace to President Coolidge, Feb. 19, 1924 (*New York Times* Feb. 26, 1924); Derrick Jensen and George Draffan, *Railroads and Clearcuts: Legacy of Congress’s 1864 Northern Pacific Land Grant*, supra at pp.16-19. The cost of building the 1883 Northern Pacific Railway Bridge and trestle west of the river on the Mandan side to its ordinary high-water mark was approximately \$1 million of the \$70 million total cost for building the transcontinental railroad

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<sup>108</sup> National Archives website, Act of July 1, 1862 (Pacific Railroad Act), 12 STAT 489, which established the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean.; 7/1/1862; Enrolled Acts and Resolutions of Congress, 1789 - 2011; General Records of the United States Government, Record Group 11; National Archives Building, Washington, DC <https://www.archives.gov/milestone-documents/pacific-railway-act>

between Duluth and Seattle (in 1883 dollars). See Eugene V. Smalley, *History of the Northern Pacific Railroad*, p. 395 (G.P. Putnam's Sons 1883).

This means that the sale of the “railroad patents” to homesteaders at \$2.50 per acre for the odd numbered sections twenty miles on each side of the right-of-way across all of Dakota Territory under the 1864 Act largely, if not totally, paid for the cost of building the right-of-way and its underlying structures across Dakota Territory, including the 1883 Northern Pacific Railway Bridge and right-of-way across Dakota Territory. Thus, the early homesteaders who received “railroad patents,” rather than the “U.S. patents” received by homesteaders under the 1862 Homestead Act (also passed in the throes of the Civil War after the southern democratic Senators who were using the Senate filibuster to block passage of the Homestead Act before the Civil War), are the ones who ultimately paid for the Historic Bridge between Bismarck and Mandan through the money they had to pay to the Northern Pacific to receive their “original patent” from the United States through the railroad as a middleman to give the Northern Pacific the money to build the railroad right-of-way. Those “railroad-patent homesteaders” literally bought and paid for the right-of-way, and structures like the Historic Bridge, with the sweat of their brow.

In 1929, after the 5-year Congressional investigation was completed, the 1929 Congress voted, with President Hoover's approval, to request that the U.S. Attorney General bring an action to declare either part or all the land given to the Northern Pacific under the 1864 Act be forfeited. This action was subsequently brought in federal court and ultimately reached the U.S. Supreme Court in *United States v. Northern Pacific*, 311 U.S. 317, 335-58 (1940), where the following issues relating to forfeiture were addressed before remand:

- Northern Pacific had not sold stock to the public, as had been required by Congress;
- Northern Pacific had not built the railroad according to the Congressionally mandated schedule;
- Northern Pacific did not open its lands to settlement and preemption as required by Congressional Mandate;
- More than a million acres had been fraudulently classified as mineral lands, so that Northern Pacific could claim prime agricultural or timber land in lieu;
- Northern Pacific wrongfully received 13.3 million acres located within Native American reservations (as discussed earlier in this memorandum, over 6 million acres was taken from the Fort Berthold Reservation by executive order of President Hayes, rather than by an act of Congress, which had approved the Treaty creating the Fort Berthold Reservation);
- Northern Pacific had illegally diverted funds from the main line to the building of branch lines; and
- Northern Pacific had delayed surveying vast portions of the land grant to avoid paying real estate and other taxes.

All the history and law discussed in this memorandum is relevant under the rules of statutory construction that apply to resolve any ambiguities in law or statutory text regarding who owns the riverbed beneath the Historic Bridge up to the ordinary high-water mark under the Equal Footing and Public Doctrines versus the language of the 1864 Act. It also is relevant for showing



why the destruction of this national landmark would be an irreparable and unreplaceable loss to the Bismarck and Mandan communities, the people of the State of North, and to an accurate historical understanding of key core principles underlying the strength and health of our constitutionally created democracy, for the reasons discussed throughout this memorandum.

### **3.0 Conclusion**

For the reasons discussed throughout this memorandum, between the Equal Footing and Public Trust Doctrines versus the 1864 Act that created the Northern Pacific, the Equal Footing and Public Trust Doctrines (and the rules of construction that apply to those doctrines under Supreme Court precedent) give ownership of the riverbed up to the ordinary high-water mark to North Dakota when it became a State on November 2, 1889, as well as the Historic Bridge itself.

Further, construing these laws to give effect to each, the ownership interest transferred to the Northern Pacific under the 1864 Act was only a right-of-way easement to build, maintain, and operate a railroad; the 1864 Act does not give Northern Pacific title or ownership to the riverbed beneath the Historic Bridge, or to the bridge itself.

It is still FORB's hope and wish that BNSF, the State of North Dakota, the communities of Bismarck and Mandan, and FORB can resolve these issues without litigation; however, if litigation becomes necessary, it is likely that many of these key issues can be resolved by summary judgment motion, brought under a legal action under one or more of the following laws:

- 42 U.S.C. §§ 1981, et seq,
- the federal Declaratory Judgment Act, 28 U.S. Code § 2201, or, alternatively,
- the North Dakota Declaratory Judgment Act, NDCC ch. 32-23, and NDRCivP 38, 39, and 57,
- any action to compel performance of a non-discretionary duty (i.e., responses to FOIA or to open Records requests, or to protect an historic property owned by the State), or
- in any appeal of the final EIS to U.S. District Court if issued by the USCG.

Further, whether any undue influence was exercised by BNSF by constantly asserting to USCG, North Dakota state and local officials, and FORB that those public and private entities would have to pay for BNSF's costs to "avoid, minimize, and mitigate" the impacts of the proposed project on the Historic Bridge under NHPA and its implementing regulations, if they wanted to save the Historic Bridge, must also be addressed. There is no such requirement under the NHPA, and to constantly assert that may constitute undue influence on state and local officials under the NHPA and the laws cited above as possible avenues for legal action.