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RECEIVED

February 2, 2010

FEB 02 2010

PUBLIC SERVICE COMMISSION

Annette Marie Bendish
Attorney at Law
North Dakota Public Service Commission
600 E Boulevard Ave., Dept 408
Bismarck, ND 58505

Re: BNSF Railway Company - Fraine Barracks Crossing - Case No. RR-10-26
Our File No. 96220.001

Dear Ms. Bendish:

We have identified some information or sources of information which the Commission may wish to consider in determining whether or not the Fraine Barracks railroad crossing is "public" or "private." This information does not come from BNSF's files; nor does BNSF have a witness who would testify to any of these matters. Instead these are matters of public record, including North Dakota statutes, of which the Commission may wish to take notice.

I. OWNERSHIP OF ADJACENT LAND:

Attached are some maps and some information from the web site maintained by the Bismarck City Assessor. The attachments provide information on the ownership of the property adjacent to the railroad tracks. The property located to the northeast appears to be owned by the City of Bismarck, while the property to the southwest appears to be owned by the State of North Dakota. Fraine Barracks is identified as the North Dakota National Guard's headquarters. The property on which Fraine Barracks is located appears to have been ceded to the State of North Dakota by the Federal Government back around 1945. As originally ceded, the property appears to have been much larger than it now appears because the State of North Dakota subsequently sold some of that property, (i.e., the property located to the northeast) to the City of Bismarck.

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Additional Information Re: Fraine Barracks Crossing

This is borne out by the North Dakota Century Code. N.D.C.C. § 54-01-10 allows the State of North Dakota to accept military and Indian reservations from the Federal Government, i.e., “The state of North Dakota may accept from the United States and any military reservation or Indian school reservation, and all property connected with either, that the United States may cede or transfer to the state, subject to any conditions and requirements which Congress may impose.”

More specifically, the State of North Dakota accepted the Fraine Barracks property from the United States under N.D.C.C. § 54-01-10.1, which appears to have been enacted back in 1945 and which provides:

The state of North Dakota hereby accepts from the United States of America the lands and improvements comprising the Bismarck Indian school plant, as authorized by Public Law 78-502, which must hereafter be known as “Fraine Barracks” in honor of the late Brigadier General John A. Fraine.

In addition, N.D.C.C. § 54-01-11 provides:

When any military reservation or Indian school reservation is ceded to the state of North Dakota by the United States, the director of the office of management and budget shall take charge of and care for the property until otherwise provided by law. The governor shall receipt to the United States for any personal property transferred to the state.

Further information about the history and ownership of Fraine Barracks may be found at <http://www.guard.bismarck.nd.us/jointforces/default.asp?ID=378>. According to that web site, the National Guard took possession of the land and buildings in October 1937 under the terms of a 1-year temporary use permit from the Department of the Interior. After several extensions of the original permit, the National Guard and the State of North Dakota’s political leaders persuaded the Federal Government to deed the property and the buildings to the State of North Dakota in 1944 for military reservation and defense purposes. The deed was accepted by the State of North Dakota on March 10, 1945. Thereafter in 1954 the State of North Dakota sold the northern part of the property to the Bismarck Board of Education for the Bismarck Junior College campus. Accordingly, the crossing appears to be adjacent to property owned by the State of North Dakota and by the City of Bismarck, both of which are public authorities.

II. DEFINITIONS OF “PUBLIC” AND “PRIVATE” RAILROAD CROSSINGS:

Federal Regulations (49 CFR § 222.9) define “public” and “private” railroad crossings as follows:

Public highway-rail grade crossing means, for purposes of this part, a location where a public highway, road, or street, including associated sidewalks or pathways, crosses one or more railroad tracks at grade. If a public authority

maintains the roadway on both sides of the crossing, the crossing is considered a public crossing for purposes of this part.

Private highway-rail grade crossing means, for purposes of this part, a highway-rail grade crossing which is not a public highway-rail grade crossing.

N.D.C.C. § 49-11-00.1 (effective 1/1/2010) defines “public” and “private” railroad crossings as follows:

In this chapter, unless the context otherwise requires:

1. “Public railroad crossing” means a location where a public highway, road, or street, including associated sidewalks or pathways, crosses one or more railroad tracks at grade. The term includes a crossing if a public authority maintains the roadway on both sides of the crossing.
2. “Private railroad crossing” means any railroad at grade crossing of a roadway which is not a public railroad crossing.

It appears that the North Dakota legislature intended to track the definitions of “public” and “private” railroad crossings found in the federal regulations so as not to create any gap or overlap between the federal and state definitions that might otherwise cause confusion.

III. STATUS OF ADJACENT LANDOWNERS AS “PUBLIC AUTHORITIES”

From the information about the ownership of the land adjacent to the railroad tracks, it appears that the properties are owned by public authorities, and that those public authorities who own that land would be responsible for the maintenance of any roads.

23 U.S.C. § 101(a)(23) defines a “public authority” as follows:

In this title, the following definitions apply ... **Public authority.** – The term ‘public authority’ means a Federal, State, county, town, or township, Indian tribe, municipal or other local government or instrumentality with authority to finance, build, operate, or maintain toll or toll-free facilities.

Federal regulations (49 CFR §222.9) further define a “public authority” as the public entity responsible for traffic control or law enforcement at a public highway-rail grade or pedestrian crossing. There does not appear to be any corresponding definition in the North Dakota Century Code or in the Manual on Uniform Traffic Control Devices, (“MUTCD”), which at times seems to use the words “public authority” and “road authority” interchangeably. The MUTCD may be found at: <http://mutcd.fhwa.dot.gov/hlm/2009/part1/part1a.htm#section1A13>

The MUTCD defines a “public road” as “any road, street, or similar facility under the jurisdiction of and maintained by a public agency and open to public travel.” (MUTCD, § 1A.13(161)). The MUTCD also defines a “Private Road Open to Public Travel” -- as “private toll roads and roads (including any adjacent sidewalks that generally run parallel to the road) within shopping centers, airports, sports arenas, and other similar business and/or recreation facilities that are privately owned, but where the public is allowed to travel without access restrictions;” but “Roads within private gated properties (except for gated toll roads) where access is restricted at all times, parking areas, driving aisles within parking areas and private grade crossings shall not be included in this definition.” The MUTCD has been adopted and has the force of law in North Dakota. *See* N.D.C.C. §§ 39-13-06, 39-13-07 and 39-13-08.

IV. STATUS OF NATIONAL GUARD AS “PUBLIC AUTHORITY”/“PUBLIC AGENCY”:

N.D.C.C. § 37-01-01(5) defines “National Guard” as follows:

‘National guard’ means that part of the military forces of this state which is organized, equipped, and federally recognized under the provisions of the National Defense Act, as amended, of the United States as the ‘national guard, air national guard, of the United States and the state of North Dakota’. The term includes also the term ‘national guard of the state of North Dakota’.

The Governor is the commander in chief, except for those portions which are deployed in the service of the United States; and among the Governor’s staff is the adjutant general. N.D.C.C. §§ 37-02-04 and 37-02-06. The office of the adjutant general is considered an administrative agency under North Dakota law. N.D.C.C. § 28-32—01(2)(b); *Stephenson v. Hoeven*, 2007 ND 136, ¶ 15; *Horst v. Guy*, 129 N.W.2d 153, 156 (N.D. 1974).

Both the federal and state governments regulate the National Guard. Under 32 U.S.C. § 110, “The President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard. ” However, federal law also recognizes the state’s jurisdiction and state law applicable to the office of the adjutant general. *See e.g.* 32 U.S.C. § 314(a): “The adjutant general is required to perform the duties prescribed by the laws of his or her jurisdiction.”

Under N.D.C.C. § 37-10-01, “All national guard facilities are under the exclusive control of the adjutant general or any officer designated by the adjutant general.” Accordingly, the Fraine Barracks facility, by law, appears to be under the exclusive control of the office of the adjutant general, which is part of the staff of the Governor of the State of North Dakota, which is a state administrative agency or “public authority.”

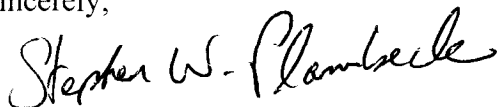
V. STATUS OF FRAINE BARRACKS CROSSING:

If the crossing is found to be “public,” federal regulations are controlling and the whistle must be sounded. If the crossing is found to be “private,” the PSC has jurisdiction to direct that whistles be sounded as a matter of public safety, or to issue an order that whistles not be sounded. BNSF has no information about who is maintaining either or both sides of the road that intersects with the tracks. Neither does BNSF know who is responsible for traffic control or the enforcement of traffic laws applicable to motor vehicles using that road.

It does appear that federal, state and/or city funds were used to construct the road; and that federal, state and/or city funds may be the source of funding for road maintenance. To the extent the applicable definition of a “public authority” requires authority to prescribe or enforce traffic laws, BNSF does not know who performs that function on this road. While the Uniform Code of Military Justice, which is the general law enforcement code for the military, applies to all territories, it does not appear to apply to National Guard personnel unless called into federal service. *See* 10 U.S.C. § 802(a)(3). The ND DOT has the responsibility to construct, maintain and control the state highway system. *See* N.D.C.C. § 24-03-02. County sheriffs and municipalities have enforcement powers. *See* N.D.C.C. §§ 11-15-03(11); and 40-05-02 (8), (9) and (14). However, there does not appear to be an express delegation of such authority to the National Guard, except perhaps generally through the office of the adjutant general as part of the Governor’s staff for the State of North Dakota. 32 CFR Part 634 nonetheless indicates that the National Guard has policies, responsibilities and procedures for supervising motor vehicle traffic on military installations; and it further appears that these regulations may apply, at least in part, to civilians, since they apply to civilian DOD personnel; but it also appears that the National Guard’s authority to police civilian guests on a military installation may be restricted. Also, it is unclear if the public’s use or access to the road as it crosses the tracks is restricted, apart from passing through the gate on one side of the tracks.

BNSF has been unable to locate any record of ever being approached by any private property owner to establish a “private” railroad crossing for access to or from Fraine Barracks.

Sincerely,



Stephen W. Plambeck

SWP/bjb
Enc.

REINKE, 0190-012-070 PIONEER (COLLEEN J.)

0190-012-075

0190-014 KLOOTV BRUC DEBOR 0190-014 O'KEE ANGE

0190-012-080

0190-012-085

0190-012-090

DELZER, JEB J

0190-012-095

FETTIG, RICHARD +8 JANET W

0190-012-100

ELY, STEPHEN A & MAIER, ROBERT & DAHL, KAREN

0190-012-105

CRANE, STEPHEN & CHENEY, JANNIS

0190-012-110

HOFFER, JERRY J & SHARON E

0190-012-110

0190-014-06

OLSEN, GARY

0190-015-070

FELCHLE, KAYLA M & BRAHRICH, ST

0190-015-065

DOUGLAS M & DENISE C

0190-015-060

CHAPMAN, CHARLES L & LINDA L

0190-015-055

WASBINDER, SHANE SCHWARTZ, BRUCE & JULIE MITCHELL, KE

0190-015-046

BROWN, KEVIN

0190-015-046

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1005 RIVER ROAD
0160-031-250

BISMARCK, CITY OF REVOLVING

609-RIVER ROAD
0160-031-180

1572-001-001
615 RIVER ROAD
CITY OF BISMARCK (WATER)

0160-031-145
500 FRANE BARRACKS ROAD
ALL MILITARY

1572-002-002
615-RIVER ROAD

1572-002-002
RIVER RD
FRANE BARRACKS RD
RIVER RD
CITY OF BISMARCK (WATER)

FRANE BARRACKS LN

FRANE BARRACKS LP

ST OF ND
ATTN: HOLLY GAUGLER

FRANE BARRACKS DR

ST OF ND
ATTN: HOLLY GAUGLER

FRANE BARRACKS DR

EVENSON
TOM K
0350-001-04

0350
HOVEY,
KEVIN E
& KELBY J
0350-0

KAUTZMAN, BRAD
& DARLENE
0350-001-050

0350-001-045
GARDNER,
LUKE R

0350-001-040
RENNER, SHERR

0350-001-039
PIATZ, MELISSA
0350-0

0350-001-030
WIL

0350-001-030

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Property Information

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LAST UPDATED TUESDAY, JANUARY 26, 2010

Parcel Number: 0160-031-250

Property Address: 1005 RIVER RD

Property Class: COMMERCIAL

Ownership Information: BISMARCK, CITY OF REVOLVING
PO BOX 5503
BISMARCK ND
58507-5503

Lot Number: TRACT 3 OF PT SEC 31 LESS PT BEG @
SE COR TH W156.8'N143.4'E133'S226.2
& LESS PT BEG @ PT 1517.6' S & 100
' W OF NE COR TH S535' W504.99' ETC

Block Number: 31

Addition: CITY LANDS 139-80

Exemption: Yes EXEMPT MUNICIPAL
For additional exemption information call 701-355-1630

Market Value: \$0.00
Market value is subject to change due to any physical change to the property or change in property status prior to February 1st.

Tax Estimate: \$0.00
Tax estimate is subject to change due to any physical change to the property or change in property status prior to February 1st. Tax estimate is also subject to change due to mill levy changes.

Your Special Assessments

Multiple Buildings: No

Year Built: 0

Total Square Footage: 0.00

Real Estate Professional Login

User Name:

Password:

[Lost my Password](#)

Property Type:
Number Floors: 0
Number of Apartment Units: 0

Land Information:

Zoning: P PUBLIC USE
Lot Front: 0.00
Lot Rear: 0.00
Average Depth: 0
Lot Sq Ft: 1,162,616.40
Vacant Lot: Y

[Burleigh County Property tax](#)

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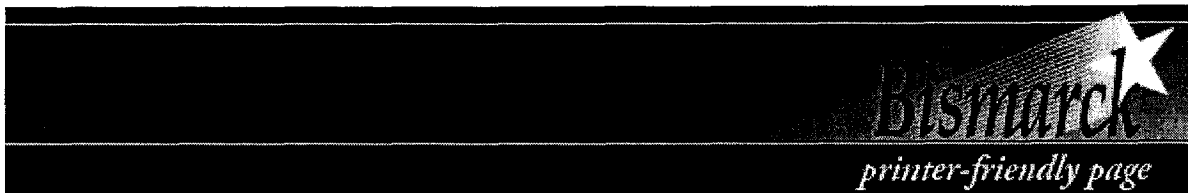
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Tuesday | January 26, 2010

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Assessing Division

Property Information

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Property Information

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LAST UPDATED TUESDAY, JANUARY 26, 2010

Parcel Number: 0160-031-145

Property Address: 1550 EDWARDS AV

Property Class: COMMERCIAL

Ownership Information: STATE OF NORTH DAKOTA
600 E BOULEVARD AVE
BISMARCK ND
58505-0550

Lot Number: PT OF AUD L 7 N E 1/4 # 13334

Block Number: 31

Addition: CITY LANDS 139-80

Exemption: Yes EXEMPT STATE OWNED
For additional exemption information call 701-355-1630

Market Value: \$0.00
Market value is subject to change due to any physical change to the property or change in property status prior to February 1st.

Tax Estimate: \$0.00
Tax estimate is subject to change due to any physical change to the property or change in property status prior to February 1st. Tax estimate is also subject to change due to mill levy changes.

Your Special Assessments

Multiple Buildings: No

Year Built: 0
Total Square Footage: 0.00
Property Type: ALL EXEMPT PROPERTY
Number Floors: 0
Number of Apartment Units: 0

Land Information:

Zoning: P PUBLIC USE
Lot Front: 0.00
Lot Rear: 0.00
Average Depth: 0
Lot Sq Ft: 5,767,780.00

Burleigh County Property tax

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