

James D. Christianson

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RECEIVED

February 24, 2010

FEB 24 2010

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

PUBLIC SERVICE COMMISSION

RE: PSC Case #RR-10-26 (BNSF/Fraime Barracks crossing)

Dear Ms. Bendish:

Attached please find one original and seven copies of my affidavit regarding PSC Case #RR-10-26.

I am writing in opposition to the Burlington Northern Santa Fe (BNSF) Railway Company's petition requesting that the Fraime Barracks railroad crossing be classified as "public" by the PSC. I respectfully ask the Commission to consider the following in determining the status of the Fraime Barracks crossing.

1. According to the US DOT Crossing Inventory, this crossing has been considered a "Private At Grade" crossing by the Federal Department of Transportation, the Federal Railroad Administration and presumably BNSF, since at least 2006. A copy of the Inventory is attached to my Affidavit as Exhibit "A."
2. According to correspondence from BNSF's Manager of Public Projects and its Assistant Director of Public Projects, BNSF has, until quite recently, considered the crossing to be "private." (Exhibits "B" and "C.")
3. Both approaches to this at-grade crossing are clearly marked (by BNSF) with "Private RR Crossing" crossbucks and "STOP" signs, as required by Federal Regulations (49 CFR Part 222.25). (Exhibits "D-3, D-4" and "E-1, E-2.")
4. The crossing is used solely by the National Guard. For several years, the public has been prohibited from entering Fraime Barracks via this crossing without presenting written permission from the National Guard at an armed security checkpoint, followed by passage through a 6-foot high, chain-link security gate. The public "usability" of the crossing, or lack thereof, must be taken into consideration when determining the status.

32 RR-10-26 Filed: 3/4/2010 Pages: 23
Exhibit 8 - Letter from James D. Christianson with
Supporting Documents dated 2-24-2010

James D. Christianson



5. Federal Regulations (49 CFR 222.9) include the following language in the definition of a “public” railroad crossing:

“... a location where a *public highway, road or street, including associated sidewalks or pathways*, crosses one or more railroad tracks at grade.” (Emphasis added.)

The unnamed road leading to the crossing does not have curb and gutter. There are no traffic signs or controls, other than those installed and maintained by BNSF at the crossing itself. There are no intersections, no streetlights, no fire hydrants. And there are no “sidewalks or pathways” located at the Fraine Barracks crossing.

6. N.D.C.C. 24-01-01.1 defines “highway, street or road” as:

“... a general term denoting a public way for purposes of vehicular travel, including the entire area within the right of way.”

N.D.C.C. 24-01-01.1 further defines “Local street or local road” to mean:

“... a street or road *primarily* for access to residence, business, or other abutting property.” (Emphasis added.)

Black’s Law Dictionary defines “highway” as:

“A free and public roadway, or street; one which every person has the right to use.”

The road to the Fraine Barracks crossing is not used primarily for access to residences or businesses; it is used primarily for access to Fraine Barracks. It is un-named and does not appear on any City, County or School District street map. It is not repaired or maintained by the City, other than occasional snow removal for access to utilities in the area. Use of the road south of the crossing is highly restricted and the road is not, “... *one which every person has the right to use.*”

7. Federal Regulations (49 CFR 222.9) define “public authority” as:

“... the public entity responsible for traffic control or law enforcement at the public highway-rail grade or pedestrian crossing.”

While it may be argued that the adjacent property owners are “public authorities,” a) no public authority maintains the road on the north side of the crossing, and b) no public authority provides “traffic control or law enforcement,” other than the National Guard security checkpoint on the south side of the crossing.

Annette Marie Bendish
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8. BNSF, through its signage, its writings and its actions, continues to treat the Fraine Barracks crossing as a private crossing. It is my understanding that BNSF rebuilt and/or replaced the crossing less than one year ago at its own expense. Without consulting the adjacent property owners, BNSF made significant capital improvements to the crossing, absent the existence of any agreement between BNSF and the adjacent property owners as to the continued use and maintenance of the crossing. I would respectfully request that BNSF representatives be asked to explain this apparent contradiction of their new position that the crossing is "public."
9. It is my understanding that Ms. Tammy Wagner, Regional Crossing of the Federal Railroad Administration, Chicago office, plans to attend the March 1, 2010 public hearing. Ms. Wagner has advised me that she will be available, if asked, to testify as to any public safety concerns or FRA concerns regarding the Fraine Barracks crossing. I would respectfully request that the Commission call upon Ms. Wagner to so testify.

In closing, I respectfully request the Public Service Commission to determine that the Fraine Barracks railroad crossing is a "private railroad crossing," as defined by N.D.C.C. section 49-11-21, and to require BSNF to cease sounding train horns at that crossing, except in the event of an emergency, immediately.

Thank you for your consideration.

Sincerely,



James D. Christianson

Encl.

5. On or about June 25, 2009 I sent an email to Mr. Spencer Arndt, known to me to be the Assistant Director of Public Projects for Burlington Northern Santa Fe Railway Company (BNSF), asking whether the Fraine Barracks crossing was considered by BNSF to be "public" or "private." I received an email response from Mr. Arndt dated June 25, 2009 stating, *"Jim - Fraine Barracks crossing is Pvt. Any other questions please feel free to contact me."* A copy of Mr. Arndt's email is attached hereto as Exhibit B.

6. On the morning of December 1, 2009, following a Public Service Commission meeting at the Capitol, I met with Ms. Lynn Leibfried, known to me to be Manager of Public Projects for BNSF, and we discussed the status of the Fraine Barracks crossing. I asked Ms. Leibfried if the Fraine Barracks whistle posts would be removed so that the train horns would stop sounding at that crossing effective January 1, 2010, as required by NDCC 49-11-21. She indicated that the whistle posts would be removed, and that she would make sure that the proper "private crossing" signage was in place. Later that morning, I sent Ms. Leibfried an email wherein I advised her of my previously referenced email correspondence with Mr. Arndt and Ms. Wagner regarding the status of the Fraine Barracks crossing. On the afternoon of December 1, 2009 I received an email from Ms. Leibfried which states, in part, *"I went to the crossing after the hearing. It does have the proper private crossing signage."* A copy of my December 1, 2009 email to Ms. Leibfried, and Ms. Leibfried's email response, is attached hereto as Exhibit C.

7. On February 17, 2010 I personally took photographs of the Fraine Barracks crossing. Four photographs, looking from north to south, are attached

hereto as Exhibits D-1, D-2, D-3 and D-4. These photographs indicate that the crossing is clearly signed as a “Private RR Crossing” from the north. Further, they show that public vehicular and pedestrian access to the Fraine Barracks is restricted and controlled by a guard booth and chain-link gates.

8. Two photographs, looking from south to north, are attached hereto as Exhibits E-1 and E2. These photographs indicate that the crossing is clearly signed as a “Private RR Crossing” from the south.

9. One photograph, looking west, is attached hereto as Exhibit F. This photograph shows two small groups of trees on either side of the railroad tracks at the approximate location where the gradual curve in the tracks occurs. Upon information and belief, it is my understanding that any trees located on City of Bismarck right-of-way that are determined to be a safety issue can and will be removed at City expense if so requested by the parties to this case or by the PSC.

10. Two photographs, looking east, are attached hereto as Exhibit G-1 and G-2. Exhibit G-2 indicates ample separation between the crossing and the entry gates to Fraine Barracks.

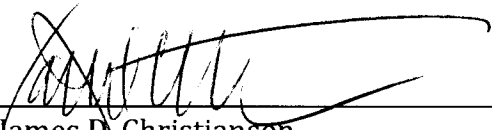
11. Exhibit H, an aerial “GIS” photograph provided me by the City of Bismarck, indicates that the curve in the railroad track occurs approximately 1,000 feet west of the Fraine Barracks crossing. Upon information and belief, it is my understanding that the locomotives of eastbound trains traveling uphill from the railroad bridge reach a speed of approximately 15 miles per hour when they arrive at the Fraine Barracks crossing.

12. Upon information and belief, it is my understanding that the general public is prohibited from entering Fraine Barracks via the railroad crossing without written authorization from the North Dakota National Guard.

13. I have been a North Dakota licensed real estate agent for nearly 20 years. During that time I have listed, showed and/or sold numerous single-family homes in west Bismarck and the Highland Acres area. Since 2006, the train horn noise at the Fraine Barracks crossing has become an issue of serious concern to home buyers and sellers alike. Tranquility and the peace and quiet of a neighborhood are important factors that buyers consider, while sellers are more concerned about their homes selling due to the noise of the train horns 24 hours each day. Upon information and belief, the train horn noise has become an environmental detriment to the residents of Highland Acres and west Bismarck in general, and it is having a negative effect on property values in the area.

FURTHER AFFIANT SAYETH NOT.

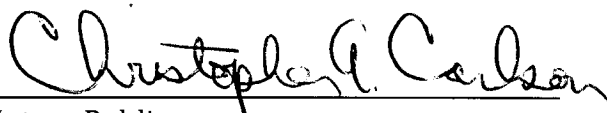
Dated this 24 day of February, 2010.



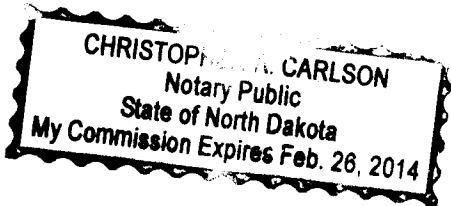
James D. Christianson

The foregoing Affidavit was acknowledged before me this 24 day of February, 2010 by James D. Christianson.

State of North Dakota)
)
County of Burleigh)



Notary Public



Subject: Fraine Barracks Grade Crossing Inventory Record

Date: Wednesday, June 24, 2009 5:30 PM

From: tammy.wagner@dot.gov

To: <gojc@qwestoffice.net>

Mr. Christianson,

Attached is the FRA's grade crossing inventory report that illustrates the Fraine Barracks crossing is listed as a private crossing. I sent a message to BNSF to verify this information to be certain that nothing has changed since 2006. In addition, I will forward you information that discusses private crossings can't exceed ¼ mile from the nearest public crossing within a proposed quiet zone.

If I can be of further assistance, please contact me.

Tammy Wagner, Regional Crossing Manager
Federal Railroad Administration
200 West Adams Street, Suite 310
Chicago, IL 60606
312-353-6203 Ext. 149

From: Wagner, Tammy (FRA)
Sent: Wednesday, June 24, 2009 5:24 PM
To: Wagner, Tammy (FRA)
Subject:

**U.S. DOT - CROSSING INVENTORY INFORMATION
AS OF 6/24/2009**

Crossing No.: **087680P** Update Reason: **Changed Crossing** Effective Begin-Date of Record: **12/14/06**
Railroad: **BNSF BNSF Rwy Co. [BNSF]** End-Date of Record:
Initiating Agency **Railroad** Type and Position: **Private At Grade**

Part I Location and Classification of Crossing

Division:	TWIN CITIES	State:	ND
Subdivision:	JAMESTOWN	County:	BURLEIGH
Branch or Line Name:	SURREY J-MANDAN	City:	Near BISMARCK
Railroad Milepost:	0196.09	Street or Road Name:	FRAINE BARRACKS
Railroad I.D. No.:	0038	Highway Type & No.:	
Nearest RR Timetable Stn:	BISMARCK	HSR Corridor ID:	
Parent Railroad:		County Map Ref. No.:	
Crossing Owner:	BNSF Rwy Co. [BNSF]	Latitude:	46.8137522
ENS Sign Installed:		Longitude:	-100.8164001
Passenger Service:	None	Lat/Long Source:	Actual
Avg Passenger Train Count:	0	Quiet Zone:	No
Adjacent Crossing with Separate Number:			

Private Crossing Information:

Category:	Industrial	Public Access:	Yes
Signs	Specify Signs: 2 REFL & 2 STOP	Specify Signals:	

ST/RR A	ST/RR B	ST/RR C	ST/RR D
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Railroad Use:

State Use:

Narrative:

Emergency Contact: (800)832-5452	Railroad Contact: (913)551-4540	State Contact:
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Part II Railroad Information

Number of Daily Train Movements:		Less Than One Movement Per Day:	No
Total Trains: 21	Total Switching: 0	Day Thru:	11
Typical Speed Range Over Crossing: From 1 to 35 mph		Maximum Time Table Speed:	35
Type and Number of Tracks: Main: 1 Other: 0		Specify:	
Does Another RR Operate a Separate Track at Crossing?	No		
Does Another RR Operate Over Your Track at Crossing?	No		

U.S. DOT - CROSSING INVENTORY INFORMATION

Crossing **087680P**

Continued

Effective Begin-Date of Record: **12/14/06**

End-Date of Record:

Part III: Traffic Control Device Information

Signs:

Crossbucks:	0	Highway Stop Signs:	0
Advanced Warning:		Hump Crossing Sign:	
Pavement Markings:		Other Signs: 0	Specify:
		0	

Train Activated Devices:

Gates:	0	4 Quad or Full Barrier:	
Mast Mounted FL:	0	Total Number FL Pairs:	0
Cantilevered FL (Over):	0	Cantilevered FL (Not over):	0
Other Flashing Lights:	0	Specify Other Flashing Lights:	
Highway Traffic Signals:	0	Wigwags:	0
Other Train Activated Warning Devices:		Bells:	0
Channelization:		Special Warning Devices Not Train Activated:	
Track Equipped with Train Signals?		Type of Train Detection:	None
		Traffic Light Interconnection/Preemption:	

Part IV: Physical Characteristics

Type of Development:	Institutional	Smallest Crossing Angle:	60 to 90 Degrees
Number of Traffic Lanes Crossing Railroad:	2	Are Truck Pullout Lanes Present?	No
Is Highway Paved?	No	If Other:	
Crossing Surface:	Timber	Is it Signalized?	No
Nearby Intersecting Highway?	N/A	Is Crossing Illuminated?	No
Does Track Run Down a Street?	No		
Is Commercial Power	Yes		

Part V: Highway Information

Highway System:		Functional Classification of Road at Crossing:	
Is Crossing on State Highway System:	No	AADT Year:	1985
Annual Average Daily Traffic (AADT):		Avg. No of School Buses per Day:	0
Estimated Percent Trucks:			
Posted Highway Speed:	0		

Subject: RE: Fraine Barracks info
Date: Thursday, June 25, 2009 2:01 PM
From: Arndt, Spencer D <Spencer.Arndt@bnsf.com>
To: Jim Christianson <gojc@qwestoffice.net>

ASSISTANT DIRECTOR PUBLIC PROJECTS
80-44TH AVE NE
MINNEAPOLIS, MN 55421

From: Jim Christianson [mailto:gojc@qwestoffice.net]
Sent: Thursday, June 25, 2009 12:09 PM
To: Arndt, Spencer D
Subject: Re: Fraine Barracks info

Spencer,

Thanks for the quick response. Can you please let me know your position with BNSF, and your location? Thanks again.

Jim

On 6/25/09 7:43 AM, "Arndt, Spencer D" <Spencer.Arndt@bnsf.com> wrote:

Jim-Fraine Barracks crossing is Pvt. Any other questions please feel free to contact me..

Subject: Re: Fraine Barracks
Date: Tuesday, December 1, 2009 4:10 PM
From: Leibfried, Lynn M <Lynn.Leibfried@BNSF.com>
To: Jim Christianson <gojc@qwestoffice.net>
Cc: "nmbruce@bis.midco.net" <nmbruce@bis.midco.net>

I went to the crossing after the hearing. It does have the proper private crossing signage. I believe that has been updated since the last time I was there. Is that the only entrance and exit to the National Guard base? I will be your contact for the quiet zone. I have been there in years past on that matter. Keep me posted on that. Are you going to continue to use SRF? I believe they put a report together a few years ago. Nice meeting you today. I'm sure we will be working together in 2010!
Thanks,
Lynn

Sent from my BlackBerry Wireless Handheld

From: Jim Christianson <gojc@qwestoffice.net>
To: Leibfried, Lynn M
Cc: Bruce Schwartz <nmbruce@bis.midco.net>
Sent: Tue Dec 01 15:13:37 2009
Subject: Fraine Barracks

Lynn,

Thank you for taking time at the PSC hearing in Bismarck today to visit with me and Bruce Schwartz about the Fraine Barracks issue. We appreciate your insight into the "private crossing" process and we take reassurance in your commitment to having the proper crossbuck signage installed to confirm that the Fraine Barracks crossing is indeed private and therefore subject to NDCC 49-11-21, as indicated by Mr. Arndt from your office at BNSF, the FRA, the US DOT and the ND DOT. We very much look forward to train horns going silent at that crossing on New Year's Day!

As an FYI, I also thought you, as BNSF's Manager of Public Projects, should know that Bismarck's downtown Quiet Rail project is progressing. A group of private property and business owners has been working closely with City staff and individual members of the City Commission to move the project forward, and we are hopeful to have formal City Commission

approval to begin the FRA/BNSF review process early next year.

Again, thanks for your time this morning at the Capitol.

Jim Christianson
NorthWest Companies
(701) 258-4800 Office
(701) 220-4888 Cell
(701) 258-4840 Fax

<http://nwcompanies.com>



Exhibit D-1
Affidavit of James D. Christianson



Exhibit D-2
Affidavit of James D. Christianson



Exhibit D-3
Affidavit of James D. Christianson



Exhibit D-4
Affidavit of James D. Christianson



Exhibit E-1
Affidavit of James D. Christianson



Exhibit E-2
Affidavit of James D. Christianson



Exhibit F
Affidavit of James D. Christianson



Exhibit G-1
Affidavit of James D. Christianson



Exhibit G-2
Affidavit of James D. Christianson



Exhibit H
Affidavit of James D. Christianson