

DELMORE LAW FIRM

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August 18, 2023

Petra H. Mandigo Hulm, Clerk
North Dakota Supreme Court
600 E Boulevard Avenue
Bismarck, ND 58505-0530

Re: Friends of the Rail Bridge, et al. v. North Dakota Department of Water
Resources, et al.,
§ (S. Ct. No. 20230255)

**Letter Motion For Leave To File A Reply Brief, And To Refile
Affidavits Filed With Original Petition And Brief For Original
Jurisdiction With Appropriate Exhibit Numbers, and other matters.**

Dear Clerk Hulm and Members of the Supreme Court:

The approximately 80 pages of briefs filed by the separate sets of parties on the respondent side on August 16th mostly address issues relevant to the appeal from the district court in Case No. 20230240, rather than two issues raised by petitioners in their petition for this Court to exercise its original jurisdiction: 1) to issue a stay while the issues raised in this case are resolved; and 2) to issue an appropriate writ ordering the North Dakota Department of Water Resources (ND DWR), the North Dakota State Historical Board, the Director of the State Historical Society, and the State to do the steps required by N.D.C.C. § 55-02-07 before the ND DWR can grant a permit to destroy the Historic 1883 Bridge in Sov. Land Permit No. S-2398.

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The Reply Brief focuses on the issues that the Petition raises for oral argument set for 9:30 AM on Monday which requests this Court to exercise its original jurisdiction. Respondents' Briefs raise issues more relevant to Case No. 20230240. Further, BNSF has been moving forward with its construction project which will result in the destruction of the Historical Bridge since Permits S-2095 and S-2398 were issued by ND DWR on April 24, 2023. Meaningful relief can be granted only if the petition for a stay is considered in a timely manner. Consideration of the relevant filings and legal issues summarized in the reply brief will help this Court with that endeavor.

It has come to our attention that the Affidavits we filed to comply with N.D.C.C. § 32-35-02 with our original Petition and Brief did not contain Exhibit numbers and titles. We are refileing them as Exhibits 1-3 with this letter motion.

We also note that the "Northern Pacific 1880 Filing Map" BNSF attached as an exhibit to its Brief in Response to the Petition shows an even wider channel than Petitioners' documented in our filings with the ND DWR, as well as a sharper angle for the Historic Bridge across the river than actually built. We are attaching that map to this letter as Exhibit 4. We are also attaching as Exhibit 7 the map of the Historic Bridge as completed by the Northern Pacific in 1882 as attached to BNSF's brief as their exhibit D. We are also attaching the General Land Office plat of the constructed bridge (Exhibit 5) and the 1894 Missouri River Commission map (Exhibit 6) which FORB submitted to the ND DWR and as Part I of our offer of proof to this Court of our permit comments in S-2398. These maps show that the entire area where BNSF is doing construction work is within the ordinary highwater mark at the time of statehood, and therefore is part of the sovereign lands transferred to North Dakota at the time of statehood under the Equal Footing and Public Trust Doctrines. See 1) Petition, 2) ¶ 15 of the Reply Brief, 3) N.D.C.C. § 47-06-05, and 4) *J. R Furlong Enterprises, Inc. v. Sun Explon & Prod. Co.*, 423 N.W.2d 130, 133 (N.D. 1988) (interpreting § 47-06-05's meaning in context under North Dakota law).

Finally, Petitioners filed as an offer of proof with its original Petition and Brief all of FORB's written comments filed in S-2095 (Parts I-IV) and all of FORB's written comments in S-2398 (Parts I-V). BNSF has now filed over 300 pages with its brief in response to those documents (although they failed to file any of those documents in either S-2095 and S-2398). It is not clear

that FORB's comments in S-2095 and S-2398 that were filed as an offer of proof have been included in this case as it currently is before this Court. To be safe, Petitioners' are refileing those comments as an attachment to this letter. Video made by ND DWR of the January 20, 2023, hearing on S-2095 received by FORB under an open records request, which has been downloaded for review at <https://www.youtube.com/watch?v=RcX2F06bLHk&t=10s>. Video made by ND DWR of the March 3, 2023, hearing on S-2398 received by FORB under an open records request, which has been downloaded for review at <https://www.youtube.com/watch?v=5fTskBHHsFQ>.

Even if this Court decides not to allow filing of the Reply Brief, it is important that all written comments FORB filed with ND DWR in S-2095 and S-2398 be included in the record of this original action in light of the 300 pages that BNSF filed with its Brief on August 16th.

Finally, BNSF says in its Brief that the U.S. Corps of Engineers determined that BNSF owns the Riverbed and Bridge as part of its right-of-way. As documented in the Final Environmental Impact Statement on Page 9, here is what the Corps said:

"On May 3, 2022, the USCG sent a letter to BNSF and FORB regarding FORB's ownership dispute. In the letter, the USCG stated that based on the evidence provided by BSNF and FORB and because the State of North Dakota chose not to assert an ownership interest in the bridge, a novel argument first advanced by FORB late in the 106 process, the USCG had determined BNSF is the proper party under USCG regulations to submit an application for replacement of the existing bridge." [Emphasis added].

Sincerely,

/s/ William J. Delmore

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Attachments:

Reply Brief

Exhibit 1 Affidavit of Tracy Potter

Exhibit 2 Affidavit of J. Signe Snortland

Exhibit 3 Affidavit of John Risch

Exhibit 4 Screenshot amplification of "Northern Pacific Railway Company certified map filed with the United States General Land Office dated July 17, 1880" showing sharper angle for the Historic Bridge across the river than actually built;

Exhibit 5 General Land Office plat of the constructed bridge

Exhibit 6 1894 Missouri River Commission map

Exhibit 7 Map of the Historic Bridge as completed by the Northern Pacific in 1882. Northern Pacific Railway Company certified map filed with the United States General Land Office dated July 17, 1882

Exhibit 8 FORB's written Comments to ND DWR in S-2095 (Parts I-IV)

Exhibit 9 FORB's written Comments to ND DWR in S-2398 (Parts I-V)