

Issuing a Permit Submitted to the Department of Water Resources, Public Meeting, January 20, 2023

Exhibit 5 Information Pertinent to State Review of BNSF's Sovereign Land Permit Application No. S-2095, Part II, Consideration Analysis Submitted to the Department of Water Resource, Public Meeting, January 20, 2023

Exhibit 6 Information Pertinent to State Review of BNSF's Sovereign Land Permit Application No. S-2095, Part III, Appendixes, Submitted to the Department of Water Resources Public Meeting, January 20, 2023

Exhibit 7 Information Pertinent to State Review of BNSF's Sovereign Land Permit Application No. S-2095, Part IV, Photographs with Citations, Submitted to the Department of Water Resources Public Meeting, January 20, 2023

Exhibit 8 Information Pertinent to State Review of BNSF's Sovereign Land Permit Application No. S-2398, Part I, Legal Questions to be Answered before Issuing a Permit, Submitted to the Department of Water Resources Public Meeting, February 26, 2023

Exhibit 9 Information Pertinent to State Review of BNSF's Sovereign Land Permit Application No. S-2398, Part II, Consideration Analysis, Submitted to the Department of Water Resources Public Meeting, February 26, 2023

Exhibit 10 Information Pertinent to State Review of BNSF's Sovereign Land Permit Application No. S-2398, Part III, Appendixes, Submitted to the Department of Water Resources Public Meeting, February 26, 2023

Exhibit 11 Information Pertinent to State Review of BNSF's Sovereign Land Permit Application No. S-2398, Part IV, Photographs with Citations, Submitted to the Department of Water Resources, Public Meeting, February 26, 2023

Exhibit 12 Information Pertinent to State Review of BNSF's Sovereign Land Permit Application No. S-2398, Part V, Additional Comments by FORB, Submitted to the Department of Water Resources, Public Meeting, February 26, 2023

[¶ 3] Petitioners filed Exhibits 1-12 as attachments to Petitioners' first combined petition and brief filed in S. Ct. No. 20230240 that was nonconforming to the requirements of N.D.R.App.P. 21. Petitioners then filed a conforming petition and brief by separating the petition and brief as set forth in Rule 21 and adding the table of contents, the table of authorities, and adding the sections of the petition and brief required by Rule 21. Petitioners failed, however, to refile the affidavits and other attachments as exhibits with exhibit numbers as required by N.D.R.App.P. 21(a)(3)(B) when they filed their conforming petition and brief for this Court to exercise its original jurisdiction in S. Ct. No. 20230240. (The rules of appellate procedure are not crystal clear on this point.) Exhibits 1-12 were filed as attachments to Petitioners' nonconforming petition and brief as an offer of proof in S. Ct. No. 20230240, as well as an offer of proof and as "other documents necessary to understand the matters set forth in the petition" N.D.R.App.P. 21(a)(3). The filing and re-filing of Exhibits 4-12 with the ND DWR was made necessary by the splitting of BNSF's original 2017 sovereign lands permit application to ND DWR (S-2095) that in 2017 was a combined "project" to both build a new two-track bridge and

tear down the existing single-track Historic 1883 Bridge, into a application in late 2022 that covered only the new bridge.

[¶ 4] Then in January 2023, shortly before the January 20th “meeting” that ND DWR had set for written and oral public comment on S-2095 on the new bridge, BNSF filed a separate application with ND DWR for a separate permit to tear down the existing bridge (S-2398). The notice for public comment on S-2398 required written comments to be filed with the ND DWR by February 26, 2023, and set the “meeting” for public comment on S-2398 for March 3, 2023. Exhibits 4-7 are the written comments FORB made in S-2095, and Exhibits 8-12 are the written comments FORB made in S-2398.

[¶ 5] On April 24, 2024, ND DWR simultaneously issued permits S-2095 and S-2398 to build the new double-track-capable new bridge and tear down the Historic Bridge. FORB had to then find a local counsel to help with the appeal, because their in-house counsel, Lyle Witham, though licensed in North Dakota, lives out of state. On May 4, 2023, FORB and Downtown Business Association filed an appeal of permits S-2095 and S-2398 after an appearance was made by William Delmore to represent the Appellants in the appeal of permits S-2095 and S-2398 to district court. After BNSF moved for dismissal of the appeal by failing to join BNSF as a necessary party, Appellants amended their appeal to district court to include BNSF as an appellee on May 10, 2023, and moved for a stay of the permits pending the outcome of the appeal under N.D.C.C. § 28-32-48 on May 12, 2023. The district court dismissed Petitioners’ appeal in Burleigh County District Court Civil No. 08-2023-CV-01083 (R Index 122, 20230240) prior to the hearing on the stay scheduled for June 28, 2023, and without ND DWR filing a certified record of S-2095 or S-2398 with the District Court. See ¶ 13 of Appellants’ Brief on the Merits in

S.Ct. No. 20230240 filed on August 21, 2023, the same day as oral argument for this case, S. Ct. No. 20230255.

[¶ 6] That BNSF received the attachments to Petitioners' first nonconforming combined petition and brief filed in S. Ct. No. 20230240 is evidenced by their reference and use of J. Signe Snortland's affidavit (Exhibit 2) in their brief and attachments in the brief BNSF filed on August 16th in S.Ct. 20230255. The Certificate of Service filed with this nonconforming brief shows that all Respondents in S.Ct. No. 20230255 were served with all the documents attached to this motion. Petitioners' request that they be allowed to re-file these documents as Exhibits 1-12 to conform with N.D.R.App.P. 21(a)(3)(B). For the reasons set forth above, all parties were served with these documents in the initial filing in this case, S. Ct. No. 20230255, and granting this motion will allow correcting the record to conform to the requirement in N.D.R.App.P. 21(a)(3)(B) be marked as exhibits.

Dated this 24th day of August, 2023.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Friends of the Rail Bridge (FORB),) Supreme Court No. 20230255
Downtown Business Association of) (Civil Original Jurisdiction)
Bismarck, and CD Holdings, LLC,)
)

Petitioners,)
)

v.)

CERTIFICATE OF SERVICE

North Dakota Department of Water)
Resources; BNSF Railway Company;)
North Dakota State Historical Board;)
the Director of the State Historical Society)
of North Dakota, William Peterson; and)
the State of North Dakota, ex rel. Drew)
Wrigley, North Dakota Attorney General,)
)

Respondents.)

[¶1] I hereby certify that I am of legal age and that on August 16, 2023, true and correct copies of the following documents:

1. Exhibit 1 Affidavit of Tracy Potter
2. Exhibit 2 Affidavit of J. Signe Snortland
3. Exhibit 3 Affidavit of John Risch
4. Exhibit 4 Information Pertinent to State Review of BNSF’s Sovereign Land Permit Application No. S-2095, Part I, Legal Questions to be Answered before Issuing a Permit Submitted to the Department of Water Resources, Public Meeting, January 20, 2023
5. Exhibit 5 Information Pertinent to State Review of BNSF’s Sovereign Land Permit Application No. S-2095, Part II, Consideration Analysis Submitted to the Department of Water Resource, Public Meeting, January 20, 2023

6. Exhibit 6 Information Pertinent to State Review of BNSF's Sovereign Land Permit Application No. S-2095, Part III, Appendixes, Submitted to the Department of Water Resources Public Meeting, January 20, 2023
7. Exhibit 7 Information Pertinent to State Review of BNSF's Sovereign Land Permit Application No. S-2095, Part IV, Photographs with Citations, Submitted to the Department of Water Resources Public Meeting, January 20, 2023
8. Exhibit 8 Information Pertinent to State Review of BNSF's Sovereign Land Permit Application No. S-2398, Part I, Legal Questions to be Answered before Issuing a Permit, Submitted to the Department of Water Resources Public Meeting, February 26, 2023
9. Exhibit 9 Information Pertinent to State Review of BNSF's Sovereign Land Permit Application No. S-2398, Part II, Consideration Analysis, Submitted to the Department of Water Resources Public Meeting, February 26, 2023
10. Exhibit 10 Information Pertinent to State Review of BNSF's Sovereign Land Permit Application No. S-2398, Part III, Appendixes, Submitted to the Department of Water Resources Public Meeting, February 26, 2023
11. Exhibit 11 Information Pertinent to State Review of BNSF's Sovereign Land Permit Application No. S-2398, Part IV, Photographs with Citations, Submitted to the Department of Water Resources, Public Meeting, February 26, 2023
12. Exhibit 12 Information Pertinent to State Review of BNSF's Sovereign Land Permit Application No. S-2398, Part V, Additional Comments by FORB,

Submitted to the Department of Water Resources, Public Meeting, February
26, 2023

13. Brief in Support of Motion for Leave to File Exhibits as Attachments to
Petitioners' Petition and Brief in Support of the Petition

14. Certificate of Service

were filed electronically with the Supreme Court through the E-Filing portal and
electronically served on the following:

1. Andrea Travnicek, Director, North Dakota Department of Water Resources,
swc@nd.gov
2. Jennifer Leigh Verleger, Office of the Attorney General, jverleger@nd.gov
3. Wade C. Mann, Crowley Fleck PLLP, wmann@crowleyfleck.com
4. Zachary R. Eiken, Crowley Fleck PLLP, zeiken@crowleyfleck.com
5. Jason A. Lien, Mason LLP, jason.lien@maslon.com
6. David R. Phillips, Bakke Grinolds Wiederholt, dphillips@bgwattorneys.com
7. William Peterson, Director of the State Historical Society of North Dakota,
billpeterson@nd.gov
8. Matt Dunlevy, Chair of the State Historical Board, matt.dunlevy@gmail.com
9. Drew Howard Wrigley, North Dakota Attorney General, ndag@nd.gov
10. Evan Nelson, Mason LLP, Evan.Nelson@maslon.com
11. Tory Lee Jackson, Amicus Curiae National Trust for Historic Preservation,
tory@tjacksonlaw.com

/s/ William J. Delmore
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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Friends of the Rail Bridge (FORB),)	Supreme Court No. 20230255
Downtown Business Association of)	(Civil Original Jurisdiction)
Bismarck, and CD Holdings, LLC,)	
)	
Petitioners,)	
)	
v.)	
)	BRIEF IN SUPPORT OF MOTION
North Dakota Department of Water)	
Resources; BNSF Railway Company;)	
North Dakota State Historical Board;)	
the Director of the State Historical Society)	
of North Dakota, William Peterson; and)	
the State of North Dakota, ex rel. Drew)	
Wrigley, North Dakota Attorney General,)	
)	
Respondents.)	

**Brief in Support of Motion for Leave to File Exhibits as Attachments to Petitioners’
Petition and Brief in Support of the Petition**

[¶ 1] The reasons and authority for granting Petitioners’ “Motion for Leave to File” are stated in the Motion. Granting this motion will allow a correction of the record in this matter, S.Ct. No. 20230255, by creating Exhibit numbers for each document referenced in the motion to conform with N.D.R.App.P. 21(a)(3)(B).

Dated this 24th day of August, 2023.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Friends of the Rail Bridge (FORB),)
Downtown Business Association of)
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v.)

North Dakota Department of Water)
Resources; BNSF Railway Company;)
North Dakota State Historical Board;)
the Director of the State Historical Society)
of North Dakota, William Peterson; and)
the State of North Dakota, ex rel. Drew)
Wrigley, North Dakota Attorney General,)

Respondents.)

Supreme Court No. 20230255
(Civil Original Jurisdiction)

CERTIFICATE OF COMPLIANCE

[¶1] The undersigned hereby certifies the above *Brief in Support of Motion for Leave to File Exhibits as Attachments to Petitioners' Petition and Brief in Support of the Petition* is in compliance with Rule 32(a)(8)(A) and Rule 32(d) of the North Dakota Rules of Appellate Procedure. The total number of pages in the *Brief in Support of Motion for Leave to File Exhibits as Attachments to Petitioners' Petition and Brief in Support of the Petition*, excluding the certificate of service and this compliance, equals two (2) pages.

Dated this 24st day of August, 2023.

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