

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Friends of the Rail Bridge (FORB),	)	Supreme Court No. 20230240
Downtown Business Association of	)	
Bismarck, and CD Holdings, LLC,	)	Burleigh County District Court
	)	Civil No. 08-2023-CV-01083
Appellants and Petitioners,	)	
	)	
v.	)	
	)	
North Dakota Department of Water	)	
Resources, and BNSF Railway Company,	)	
	)	<b>PETITIONERS REQUEST</b>
Appellees and Respondents, and	)	<b>ORAL ARGUMENT ON THIS</b>
	)	<b>PETITION</b>
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.	)	

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**Appellants' Petition to Supreme Court to Exercise its Original Jurisdiction and  
Issue Appropriate Prerogative Writs and Orders**

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## 1.0 The relief sought

[¶ 1] Pursuant to N.D.R.App.P. 21(a)(2)(A), Petitioners and Appellants Friends of the Rail Bridge (FORB), Downtown Business Association of Bismarck, and CD Holdings, LLC, hereby petition the Supreme Court to exercise its original jurisdiction and issue appropriate prerogative writs and orders:

- a. to stay Sovereign Land Permits S-2095 and S-2398 issued by Appellee and Respondent North Dakota Department of Water Resources (ND DWR) to Appellee and Respondent BNSF Railway Company (BNSF) on April 24, 2023, to destroy and remove the Historic Railway Bridge constructed between Bismarck and Mandan between 1880 and 1883 (S-2398) and build a new railway bridge just 20-30 feet north of the Historic Bridge (S-2095), an alternative that requires destruction of the Historic Bridge after the new bridge is constructed, rather than “EIS Offset Alternative 2: 92.5-foot Offset, 400-foot Spans, Retain Existing Structure” as a “reasonable alternative to destruction” that allows both preservation of the Historic Bridge and construction of a new railway bridge as requested by Appellant and Petitioner FORB in the “Conclusion” to Part I of FORB’s written comments to Appellee and Respondent North Dakota Department of Water Resources in both S-2095 and S-2398; and
- b. to issue a writ of mandamus or other appropriate supervisory writ or order to the North Dakota Department of Water Resources, North Dakota State Historical Board, the Director of the State Historical Society of North Dakota, and the State of North Dakota to consider and address all issues required of them by N.D.C.C.

§ 55-02-07 before an historical structure located on state-owned sovereign land that has been determined to be “significant” by the Director may be destroyed.

## **2.0 The Issues Presented for Review, including a Concise Statement of the**

### **Applicable Standard of Review**

[¶ 2] N.D.C.C. § 55-02-07 provides:

Any historical or archaeological artifact or site that is found or located upon any land owned by the state or its political subdivisions or otherwise comes into its custody or possession and which is, in the opinion of the director of the state historical society, significant in understanding and interpreting the history and prehistory of the state, may not be destroyed, defaced, altered, removed, or otherwise disposed of in any manner without the approval of the state historical board, unless section 55-02-07.2 applies to the site. Notification of the director's opinion of significance must be communicated to the appropriate governing official. The state historical board through the director, within sixty days of written notification to it by the appropriate governing official of the state or political subdivision's desire, need, or intent to destroy, alter, remove, or otherwise dispose of a significant artifact or site, shall provide the governing official written direction for the care, protection, excavation, storage, destruction, or other disposition of the significant artifact or site. The state and its political subdivisions shall cooperate with the director in identifying and implementing any reasonable alternative to destruction or alteration of any historical or archaeological artifact or site significant in understanding and interpreting the history and prehistory of the state before the state historical board may approve the demolition or alteration.

[¶ 3] The “Conclusion” to Part I of FORB’s written comments to Appellee and Respondent North Dakota Department of Water Resources in both S-2095 and S-2398 stated:

For the reasons stated above, because the Historic Bridge is located on sovereign lands, ND DWR has authority to approve, grant ... condition, modify, or deny BNSF’s Sovereign Lands permit application. Also, for the reasons discussed above, the State has a nondiscretionary duty under NDCC § 55-02-07 to cooperate with political subdivisions and the director of the state historical society “in identifying and implementing any reasonable alternative to destruction” of the Historic Bridge. ND DWR should consider “any reasonable

alternative to destruction” identified through that process, including any identified in this Sovereign Lands permit proceeding. FORB supports “EIS Offset Alternative 2: 92.5-foot Offset, 400-foot Spans, Retain Existing Structure” as a “reasonable alternative to destruction” that satisfies the requirement that the Historic Bridge be preserved when there is, as in this case, a “reasonable alternative to destruction.”

Exhibit entitled Part I of written comments submitted by FORB to ND DWR in S-2095, p. 58 (filed with Supreme Court July 21, 2023); Exhibit entitled Part I of written comments submitted by FORB to ND DWR in S-2398, p. 83 (filed with Supreme Court July 21, 2023).

**[¶ 4] Issue 1: Whether to stay Sovereign Land Permits S-2095 and S-2398 issued by Appellee and Respondent ND DWR to Appellee and Respondent BNSF on April 24, 2023, to destroy and remove the Historic Railway Bridge constructed between Bismarck and Mandan between 1880 and 1883 (S-2398) and build a new railway bridge just 20-30 feet north of the Historic Bridge (S-2095).**

[¶ 5] Summary of facts relevant to Issue 1 under N.D.R.App.P. 21(a)(2)(C) and N.D.R.App.P. 28(b)(3). Tearing down an existing railway bridge and building a new railway bridge across a navigable river requires both federal and state permits. BNSF applied to ND DWR for Sovereign Land Permit S-2095, a state permit, in 2017. The 2017 S-2095 permit application was a combined application to both tear down the existing single-track Historic 1883 Bridge between Bismarck and Mandan and build a new railway bridge capable of carrying two tracks north of the existing single-track Historic Bridge. BNSF chose to delay moving forward with S-2095 until BNSF was near completion of BNSF’s federal permit to tear down the Historic 1883 Bridge and build a new 20-30 feet north of the Historic Bridge. In both the federal and state permit

applications, BNSF stated its intent to continue using the single-track Historic Bridge during the 2-3 years it will take to build the new bridge. In late 2022, BNSF requested that the ND DWR renew consideration of S-2095 but limited that application to building a new bridge. In December 2022, FORB requested a hearing to allow public comment on S-2095. ND DWR granted that request, allowing written comments on S-2095 until the close of the hearing on January 20, 2023, and oral comments at the hearing (called a “meeting” by ND DWR’s rules) on January 20, 2023. In early February 2023, BNSF filed a separate permit application, S-2398, to tear down the Historic Bridge at the completion of construction of the new bridge under S-2095. On February 10, 2023, shortly after BNSF submitted Sovereign Land Permit No. S-2398 to ND DWR to allow BNSF to tear down the 1883 Historic Bridge, the current Director of the State Historical Society, William Peterson, determined for purposes of Sovereign Land Permit No. S-2398 that the 1883 Historic Bridge is a “significant” historical resource under William Peterson. On February 14, 2023, Assistant Attorney General Joshua Amundson sent an unsolicited “Memorandum” in his own name to Respondent William Peterson in his own name, and not Director of the State Historical Society, that stated that the State owns the Riverbed beneath the Historic Bridge, but that BNSF owns the Historic Bridge, thus making N.D.C.C. § 55-02-07 in applicable to BNSF’s permit application to ND DWR. On February 24, 2023, FORB submitted to ND DWR the Exhibit entitled Part I of written comments submitted by FORB to ND DWR in S-2398, section 6.5, pp. 76-81 (filed with Supreme Court July 21, 2023), objecting to the legality of this February 14<sup>th</sup> “memorandum” from Joshua Amundson to Dr. Peterson. On March 2, 2023, the day before the State Historical Board was to consider whether to approve destruction of the



Historic Bridge N.D.C.C. § 55-02-07, Assistant Attorney General Joshua Amundson sent an “Amended Memorandum” to Director Peterson again stating that the State owns the Riverbed beneath the Historic Bridge, but that BNSF owns the Historic Bridge. On March 3, 2023, Respondent Attorney General Drew Wrigley made a joint appearance at the State Historical Board’s March 3<sup>rd</sup> meeting with BNSF’s counsel to say he agreed with Joshua Amundson’s March 2<sup>nd</sup> “Amended Memorandum.” *See* Affidavit of J. Signe Snortland attached as an Exhibit to this Petition. That meeting denied any opportunity for public comment. Based on General Wrigley’s oral opinion that N.D.C.C. § 55-02-07 did not apply to the Historic 1883 Bridge, Respondent North Dakota State Historical Board did not vote at its March 3<sup>rd</sup> meeting whether to allow destruction of the Historic Bridge under N.D.C.C. § 55-02-07 based on General Wrigley’s oral opinion at the March 3<sup>rd</sup> meeting. *Id.*

[¶ 6] On April 24, 2023, ND DWR issued Sovereign Land Permits S-2095 and S-2398 without going through the steps required by N.D.C.C. § 55-02-07 or voting on whether to allow destruction of the Historic 1883 Bridge under either N.D.C.C. § 55-02-07 or N.D. Admin. Code § 89-10-01-27. Petitioners and Appellants appealed Permits S-2095 and S-2398 to District Court on May 4, 2023. Petitioners and Appellants made a motion for a stay to the District Court, filed two briefs in support of a stay to the District Court, and scheduled a hearing on the stay for June 28, 2023. The District Court dismissed the appeal before the June 28<sup>th</sup> hearing on whether a stay should be granted. The District Court dismissed Petitioners’ and Appellants’ appeal because Petitioners and Appellants did not file an administrative complaint with ND DWR contesting the issuance of Permits S-2095 and S-2398. *See* N.D.R.App.P. 8.

**[¶ 7] Issue 2: Whether to issue a writ of mandamus or other appropriate supervisory writ or order to the Appellee and Respondent ND DWR, and Respondents North Dakota State Historical Board, the Director of the State Historical Society of North Dakota, and the State of North Dakota ex rel. General Wrigley to consider and address all issues required of them by N.D.C.C. § 55-02-07 before an historical structure located on state-owned sovereign land that has been determined to be “significant” by the Director may be destroyed.**

[¶ 8] The summary of facts relevant to Issue 2 under N.D.R.App.P. 21(a)(2)(C) and N.D.R.App.P. 28(b)(3) is the same as Issue 1, ¶¶ 5-6 above. Respondents North Dakota State Historical Board, the Director of the State Historical Society of North Dakota, and the State of North Dakota ex rel. General Wrigley were not Appellees in the District Court because they did not issue permits to BNSF in S-2095 or S-2398; however, they were and are responsible for performing their statutory roles under N.D.C.C. § 55-02-07 before Permits S-2095 and S-2398 may be legally issued by ND DWR. Thus, they are necessary parties who must be included as respondents before a writ may be issued by the Supreme Court under its original jurisdiction.

[¶ 9] For the reasons stated in this petition and brief in support of this petition, the issues raised in the appeal and this petition are issues of law fully reviewable by the Supreme Court in this appeal and in any exercise of this Court’s original jurisdiction. These issues do not involve any issues of fact.

### 3.0 Supporting Documents and Evidence

[¶ 10] Pursuant to N.D.R.App.P. 21(a)(3), the following supporting documents have been filed with this petition:

- Brief in Support of Petition to Supreme Court to Exercise its Original Jurisdiction and Issue Appropriate Prerogative Writs and Orders;
- Affidavits of Tracy Potter, J. Signe Snortland, and John Risch in Support of Petition to Supreme Court to Exercise its Original Jurisdiction and Issue Appropriate Prerogative Writs and Orders; and
- FORB’s written comments—Parts I-IV in S-2095 and Parts I-V in S-2398—that are attached to this Petition as part of an offer of proof that FORB raised and argued to the ND DWR in both S-2095 and S-2398 all the issues Appellants and Petitioners are raising in this Petition.

[¶ 11] Petitioners’ offer of proof includes FORB’s written comments, Parts I-IV in S-2095 and Parts I-V in S-2398. FORB electronically filed Parts I-IV in S-2095 on January 18-19, 2023, in the manner described in the Public Notice for that administrative proceeding. FORB electronically filed Parts I-V in S-2398 on February 24 and 26, 2023, in the manner described in that Public Notice. In addition, Petitioners include as part of their offer of proof the recorded 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>. Finally, Petitioners include as part of their offer of proof the recorded 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>. These written and oral comments are the record that Petitioners and Appellants requested the ND DWR to prepare in Petitioners' and Appellants' appeal of Permits S-2095 and S-2398 to the District Court. This is also the record that Petitioners will rely on in requesting this Court to exercise its original jurisdiction to provide the relief described in ¶ 1 of this petition.

[¶ 12] Petitioners and Appellants requested that ND DWR prepare this record for the administrative appeal to District Court of the Sovereign Lands permits and requested and received an order from the District Court expediting the preparation of that record. ND DWR failed to prepare the record as ordered, however, claiming that there was no record to prepare. All of these supporting documents and other evidence is “necessary to understand the matters set forth in the petition.” N.D.R.App.P. 21(a)(3).

#### **4.0 Arguments in Support of this Court Exercising its Original Jurisdiction**

[¶ 13] Permit proceedings S-2095 and S-2398 are each an “adjudicative proceeding [that] does not involve a hearing on a complaint against a specific-named respondent.” N.D.C.C. § 28-32-21(3)(a). The right to directly appeal a final permit under chapter 28-32 is well established. Sovereign Land Permit Numbers S-2095 and S-2398 each constitute an “agency action of particular applicability which determines the legal rights, duties, privileges, immunities, or other legal interests of one or more specific persons,” and therefore are “orders” appealable under the North Dakota Administrative Agencies Practice Act, N.D.C.C. ch. 28-32. N.D.C.C. § 28-32-01(8). As such, these permits are subject to appeal under N.D.C.C. ch. 28-32. The record on appeal consists of the proceedings before the agency, including any permit proceedings where public comment was received. *Aggie Investments GP, v. Public Service Com'n of North Dakota*, 451

N.W.2d 141, 142-44 (N.D. 1990); *People to Save the Sheyenne River, Inc. v. North Dakota Dept. of Health*, 2005 ND 104, 697 N.W.2d 319; *National Parks Conservation Association v. North Dakota Department of Environmental Quality*, 2020 ND 145, ¶ 9, 945 N.W.2d 318, 321-22. The ND DNR is not exempted from application of N.D.C.C. ch. 28-32, as numerous state agencies are. N.D.C.C. § 28-32-01(1)(a-f).

[¶ 14] *Aggie Investments*, 451 N.W.2d at 143, states:

Although persons attending the hearing were informed through a PSC handout entitled “Procedure in Major Rate Cases” that they could be sworn as witnesses if they wanted their statements to be part of the “official record,” we do not believe that the absence of sworn testimony and formally introduced evidence renders the public input hearing any less a “hearing” for appellate jurisdiction purposes. “The word ‘hearing’ contemplates an opportunity to be heard.” *State v. Milhollan*, 50 N.D. 184, 195 N.W. 292, 295 (1923). Unlike the ultimate decision-making meetings at issue in *Happy Day*, the Fargo public input hearing clearly contemplated the public's opportunity to have their statements included as part of the “official record.”

[¶ 15] In this case, ND DWR gave public notice and invited both written and oral comments on both Permit Application S-2095 and S-2398. Thus, ND DWR “clearly contemplated the public's opportunity to have their statements included as part of the ‘official record,’” and Petitioners and Appellants made their written and oral comments as demonstrated in this offer of proof based on that understanding. Appellants comments are therefore part of the “official record” for Permit Applications S-2095 and S-2398.

[¶ 16] ND DWR and BNSF argued to the District Court that the only way that Petitioners and Appellants can create a record for appeal in S-2095 and S-2398 was to file a complaint against a specific-named respondent in a contested-case adjudicative proceeding. There is no basis under North Dakota law and no precedent for such a claim. Rather, it is well established that a permit is an “adjudicative proceeding [that] does not involve a hearing on a complaint against a specific-named respondent.” N.D.C.C. § 28-

32-21(3)(a). It is also well established that participants may make an appealable record by making and filing oral and written comments in permit proceedings. *See Aggie Investments, People to Save the Sheyenne, and National Parks Conservation Association* cited in ¶ 13 above.

[¶ 17] Further, it would create an untenable precedent for a project such as this one that 1) involves tens of millions of dollars of costs and consequences for the railroad, the community, and the State, 2) that will result in the destruction of an iconic historical structure that is still structurally sound, that has been in near continuous use for 140 years and will remain in use by the railroad for the next three years while a new bridge is built 20-30 feet north of it, and 3) for which there are separate federal and state permitting requirements and proceedings before it can be built—to require members of the public to file an additional “complaint against a specific-named respondent” in a contested case adjudicative proceeding before the legal and factual issues raised by the public in the state permit proceeding can or will be fully considered by the agency or thereafter appealed to District Court.

[¶ 18] Permits S-2095 and 2398 were both issued on April 24, 2023. More than two months have passed since Petitioners filed their appeal to District Court and requested by motion an expedited preparation of the administrative record, and an expedited hearing and briefing schedule for the appeal and moved for a stay of Permits S-2095 and S-2398 pending outcome of the appeal. In the meantime, construction has advanced to an extent that may cause irreparable harm to the eastern pier of the Historic Bridge. In addition, steps are being taken that, if continued, will make “EIS Offset Alternative 2: 92.5-foot Offset, 400-foot Spans, Retain Existing Structure” as a “reasonable alternative to

destruction” that allows both preservation of the Historic Bridge and construction of a new railway bridge as requested by Appellant and Petitioner FORB in the “Conclusion” to Part I of FORB’s written comments to Appellee and Respondent North Dakota Department of Water Resources in both S-2095 and S-2398—either moot or too advanced to reasonably alter the course of construction. *See* ¶ 1 above. The issues for which Petitioners ask this Court to exercise its original jurisdiction are issues of law that would have been fully reviewable on appeal had the appeal not been dismissed, and that will not require this Court to make any findings of fact. For the reasons shown in this offer of proof and discussed in more detail below, this Court should exercise its original jurisdiction and address the issues of law that the ND DWR was legally required to address under N.D.C.C. § 55-02-07 before issuing Sovereign Land Permits S-2095 and S-2398 to BNSF.

#### **4.1 Discretion of the Supreme Court to Exercise its Original Jurisdiction**

[¶ 19] N.D.Const. Art. VI, § 2 states that the Supreme Court “shall have appellate jurisdiction and shall also have original jurisdiction with authority to issue, hear, and determine such original and remedial writs as may be necessary to properly exercise its jurisdiction.” In addition, N.D.C.C. §§ 27-02-04, 32-34-01, and 32-35-02 “provide further statutory authorization for supervisory writs, writs of mandamus, and writs of prohibition.” *Burlington Northern, Inc. v. North Dakota District Court, Richland County, Third Judicial District*, 264 N.W.2d 453, 455 (N.D. 1978).

[¶ 20] N.D.C.C. § 27-02-04 provides that the Supreme Court “may exercise appellate jurisdiction only, except when otherwise specially provided by law or by the constitution.” The Supreme Court “in the exercise of its original jurisdiction, may issue

writs of habeas corpus, mandamus, quo warranto, certiorari, and injunction.” *Id.* The Supreme Court “shall exercise its original jurisdiction only in habeas corpus cases and in such cases of strictly public concern as involve questions affecting the sovereign rights of this state or its franchises or privileges.” *Id.* This petition involves sovereign lands permits that “affect the sovereign rights of this state.” The issuance of S-2095 and S-2398 will result in the destruction the 140-year-old Historic Bridge and the construction of a new bridge, which will reshape the riverfront and the business districts of Bismarck and Mandan for decades to come and will irreparably change the cultural, aesthetic, recreational, and transportation options and opportunities for the community and the State in ways that can never be undone.

[¶ 21] N.D.C.C. § 32-34-01 provides:

The writ of mandamus may be issued by the supreme and district courts to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled and from which the party is precluded unlawfully by such inferior tribunal, corporation, board, or person.

[¶ 22] N.D.C.C. § 32-35-02 provides:

The writ of prohibition may be issued by the supreme and district courts to an inferior tribunal, or to a corporation, board, or person in any case, if there is not a plain, speedy, and adequate remedy in the ordinary course of law. It is issued upon affidavit on the application of the person beneficially interested.

In this case, there is not a plain, speedy, and adequate remedy in the ordinary course of law to stay permits S-2095 and S-2398 until ND DWR, the North Dakota State Historical Board, the Director of the State Historical Society of North Dakota, and the State of North Dakota follow the steps required by N.D.C.C. § 55-02-07 (including consideration of the Equal Footing and Public Trust doctrines as enunciated in cases decided by the



North Dakota Supreme Court, and the North Dakota Constitution’s “gift clause,” N.D. Const., art. X, § 18, and provision that forbids transfer of state-owned property by adverse possession, N.D. Const. art. IX, § 9). *See* FORB’s comments in S-2398, Part I, pp. 16-36 and pp. 67-71. Thus, Petitioners are requesting this Court to exercise its original jurisdiction to address these issues and issue the appropriate prerogative writs.

[¶ 23] The power vested in the Supreme Court “to issue original and remedial writs, even upon a proper showing, is discretionary and cannot be invoked as a matter of right, and the court will determine for itself whether or not the case is within its jurisdiction.” *State ex rel. Link v. Olson*, 286 N.W.2d 262, 266 (N.D. 1979), citing *Burlington Northern, Inc.*, *supra*, 264 N.W.2d 453 and *State v. Nelson County*, 1 N.D. 88, 45 N.W. 33 (1890). “It is well-settled that the power of the court to exercise its original jurisdiction extends only to those cases in which the question presented is *Publici juris*, wherein the sovereignty of the state, the franchises or prerogatives of the state, or the liberties of its people are affected.” *State ex rel. Link*, *supra*, 286 N.W.2d at 266. “The interest of the state must be primary, not incidental, and the public, the community at large, must have an interest or right which may be affected.” *Id.* In this case, considering alternatives to destruction of the Historic Bridge as required by N.D.C.C. § 55-02-07 before issuing Sovereign Land Permits S-2095 and S-2398 to BNSF is *Publici juris*, affects the sovereignty of the state by affecting the sovereign lands of the State beneath and surrounding the Historic Bridge, and affects the liberties of its people by affecting their access, use, and enjoyment of this historically significant property located on sovereign lands owned by the State through destruction of that property. Further, for the reasons discussed in this petition, “The interest of the state” is

“primary, not incidental, and the public, the community at large,” has “an interest or right which may be affected.”

[¶ 24] As Appellant FORB said in Part I, p. 16, of the written comments FORB submitted to ND DWR for S-2398 on February 24, 2023:

This combined construction/destruction permit application is not about the safety or the structural integrity of the Historic Bridge, or about whether a new bridge can be built. The evidence shows that it is not an either/or choice. The new bridge can be built 92.5 feet north of the existing bridge in a way that will not impact navigation or flooding and that preserves the existing Historic Bridge from destruction. For the reasons discussed below, that is the choice that North Dakota law requires ND DWR to pursue under the Public Trust Doctrine and the provisions of NDCC § 55-02-07 that are long-established requirements of North Dakota law that apply to Sovereign Lands of the State.

The two key factors that must be considered under NDCC § 55-02-07 are undisputed.

[¶ 25] First, the State owns the riverbed beneath the Historic Bridge. The Historic 1883 Bridge is located on sovereign lands owned by the State of North Dakota toward which the State has a special responsibility under the Public Trust Doctrine. “During territorial days title to these lands (beds of navigable waters) was held in trust by the United States for the ‘ultimate benefit of future states.’ ... When sovereignty was conferred upon the State of North Dakota it gained title to the lands under navigable waters as an incident of sovereignty. No specific conveyance of such title was necessary.” *State v. Loy*, 74 N.D. 182, 190, 20 N.W.2d 668, 671 (1945). See also, *State ex rel. Sprynczynatyk v. Mills*, 523 N.W.2d 537, 539 (N.D. 1994); *Reep v. State*, 2013 ND 253, ¶¶ 14-15, 841 N.W.2d 664, 671-72; *Sorum v. State*, 2020 ND 175, ¶¶ 42-43, 947 N.W.2d 382, 396-97. This ownership of the land “below ordinary high water mark” by the Territory of Dakota was recognized in its territorial laws as set forth in the territory’s revised code of 1877:

§ 169. LAND BELOW HIGH WATER MARK.] The ownership of land below ordinary high water mark, and of land below the water of a navigable lake or stream, is regulated by the laws of the United States or by such laws as, under authority thereof, the legislative assembly may enact. The territory is the owner of all property lawfully appropriated or dedicated to its own use; and of all property of which there is no other owner.

The Revised Codes of the Territory of Dakota (1877), § 169. Compare N.D.C.C. § 47-01-10, citing “Civ. C. 1877, § 169” as the first codification of § 47-01-10.

[¶ 26] Second, the Historic Bridge is “significant in understanding and interpreting the history and prehistory of the state” under N.D.C.C. § 55-02-07. The Historic 1883 Bridge has been unequivocally recognized as “significant” under both Federal and State law in both the Federal and State permitting proceedings as set forth in ¶¶ 27-29 below.

[¶ 27] In 2017, shortly after BNSF submitted its application for Sovereign Land Permit No. S-2095 to the ND DWR, the Director of the State Historical Society of North Dakota at that time, Claudia Berg, sent a response to the ND DWR’s inquiry under N.D. Admin. Code § § 89-10-01-06(1)(c), stating in her response that the 1883 Historic Bridge was an important historical structure “eligible for the National Register of Historic Places.” See Exhibit 1, Appellants’ Brief in Support of Application for Expedited Hearing on Motion for Stay in the District Court.

[¶ 28] In August 2017, BNSF’s own contractor determined that the 1883 Historic Bridge “is recommended *eligible* for listing in the NRHP [National Register of Historic Places] under criteria A, B, and C.” the fact that Juniper Environmental Consulting, BNSF’s contractor, recommended the Historic Bridge as eligible under all three criteria of the NRHP, not just one, is meaningful. Eligibility for listing under just one criterion is

sufficient for listing under the NRHP. See Exhibit 5, Appellants' Brief in Support of Application for Expedited Hearing on Motion for Stay in the District Court.

[¶ 29] On February 10, 2023, shortly after BNSF submitted Sovereign Land Permit No. S-2398 to ND DWR to allow BNSF to tear down the 1883 Historic Bridge, the current Director of the State Historical Society, William Peterson, also determined for purposes of Sovereign Land Permit No. S-2398 that the 1883 Historic Bridge is a "significant" historical resource under N.D.C.C. § 55-02-07. See Exhibit 2, Appellants' Brief in Support of Application for Expedited Hearing on Motion for Stay in the District Court. Petitioners' written and oral comments in both the S-2095 and S-2398 permit proceedings discuss in detail the Historic Bridge's significance and importance under both State and National historic preservation laws.

[¶ 30] In summary, the key factors this Court must consider before exercising its original jurisdiction are present and support exercising that discretion for this Petition. First, issuing a writ that orders ND DWR, the North Dakota State Historical Board, the Director of the State Historical Society of North Dakota, and the State of North Dakota to follow the steps required by N.D.C.C. § 55-02-07 before issuing Sovereign Land Permits S-2095 and S-2398 to BNSF: 1) meets the requirements of being *Publici juris*, 2) affects the sovereignty of the state by affecting the sovereign lands of the State beneath and surrounding the Historic Bridge, and 3) affects the liberties of its people by affecting their access, use, and enjoyment of this historically significant property located on sovereign lands owned by the State through destruction of that property.

[¶ 31] Second, for the reasons discussed above, the "interest of the state" is "primary, not incidental, and the public, the community at large," and the State has "an interest or

right which may be affected.”

[¶ 32] Third, the issuance of S-2095 and S-2398 in their current form results in the destruction the 140-year-old Historic Bridge and the construction of a new bridge in a way that reshapes the riverfront and the business districts of Bismarck and Mandan for decades to come and that will irreparably change the cultural, aesthetic, recreational, and transportation options and opportunities for the community and the State in ways that can never be undone.

[¶ 33] Fourth, the State owns the riverbed beneath the Historic Bridge and has a special responsibility under the Public Trust Doctrine to preserve it.

[¶ 34] Fifth, Historic Bridge has been determined to be “significant in understanding and interpreting the history and prehistory of the state” under N.D.C.C. § 55-02-07 by two Directors of the North Dakota Historical Society, in 2017 when S-2095 was first applied for, and again in January of 2023, when BNSF belatedly applied for S-2398 to destroy the Historical Bridge.

[¶ 35] Sixth and finally, there is no other plain, speedy, and adequate remedy in the ordinary course of law to stay permits S-2095 and S-2398 as required by N.D.C.C. § 32-35-02 before a writ of prohibition may be issued.

[¶ 36] Pursuant to N.D.R.App.P. 44, Attorney General Drew Wrigley is being served with a copy of this Petition which raises State constitutional issues and issues involving state sovereignty over sovereign lands under the Equal Footing and Public Trust Doctrines.

## 5.0 Petition for Relief

[¶ 37] For the reasons discussed in this Petition, Appellants and Petitioners request that the Supreme court use its discretion to exercise its original jurisdiction and grant the relief requested in ¶ 1 of this petition. As part of that discretion, Petitioners request that the Supreme Court address the issues of law regarding ownership of the riverbed and Historic Bridge discussed in the Brief in Support of this Petition, as well as the issues of law relating to the meaning of N.D.C.C. § 55-02-07 and N.D. Admin. Code § 89-10-01-27 as they apply to the Historic Bridge discussed in the Brief in Support of this Petition. For the reasons discussed in ¶¶ 25-35, Petitioners request an expedited briefing schedule and oral argument on the issues raised in the appeal and this petition.

[¶ 38] Request for oral argument. Because of the complexities of the legal issues in this petition, Appellants and Respondents request oral argument on those issues.

Dated July 25, 2023

Respectfully submitted,

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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Friends of the Rail Bridge (FORB),	)	Supreme Court No. 20230240
Downtown Business Association of	)	
Bismarck, and CD Holdings, LLC,	)	Burleigh County District Court
	)	Civil No. 08-2023-CV-01083
Appellants and Petitioners,	)	
	)	
v.	)	
	)	
North Dakota Department of Water	)	
Resources, and BNSF Railway Company,	)	
	)	
Appellees and Respondents, and	)	<b>CERTIFICATE OF COMPLIANCE</b>
	)	
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.	)	

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The undersigned hereby certifies the above Petition is in compliance with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure. The total number of pages in the *Appellants' Petition to Supreme Court to Exercise its Original Jurisdiction and Issue Appropriate Prerogative Writs and Orders*, excluding the certificate of service and this compliance, is twenty two (22) pages.

Dated this 25th day of July, 2023.

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IN THE SUPREME COURT  
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Downtown Business Association of	)	
Bismarck, and CD Holdings, LLC,	)	Burleigh County District Court
	)	Civil No. 08-2023-CV-01083
Appellants and Petitioners,	)	
	)	
v.	)	
	)	
North Dakota Department of Water	)	
Resources, and BNSF Railway Company,	)	
	)	
Appellees and Respondents, and	)	<b>CERTIFICATE OF SERVICE</b>
	)	
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.	)	

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[¶1] I certify that on July 25, 2023, the **APPELLANTS’ PETITION TO SUPREME COURT TO EXERCISE ITS ORIGINAL JURISDICTION AND ISSUE APPROPRIATE PREROGATIVE WRITS AND ORDERS** and **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. Joshua Andrew Amundson, Office of the Attorney General, jaamundson@nd.gov



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

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