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ENTERED
Office of Proceedings
October 15, 2021
Part of
Public Record

October 15, 2021

By e-filing

Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20024

Re: Docket No. AB-857 (Sub-No. 2X), *Colorado Landowners -- Adverse
Abandonment -- Great Western Railway of Colorado, LLC in Weld County,
Colorado*

Dear Ms. Brown:

Hereby transmitted is a Petition For Partial Waiver Of Abandonment Regulations And
For Exemption From Statutory Requirements for filing with the Board in the above referenced
matter.

The filing fee of \$2,200 is being paid electronically via *pay.gov*.

Respectfully submitted,

/s/ Thomas F. McFarland

Thomas F. McFarland
*One of the Attorneys for Colorado
Landowners Identified in Appendix 1*

TMcF:mg:1918\efSTB1

FILED
October 15, 2021
SURFACE TRANSPORTATION BOARD

FEE RECEIVED
October 15, 2021
SURFACE TRANSPORTATION BOARD

BEFORE THE
SURFACE TRANSPORTATION BOARD

COLORADO LANDOWNERS --)
ADVERSE ABANDONMENT -- GREAT) DOCKET NO.
WESTERN RAILWAY OF COLORADO,) AB-857 (SUB-NO. 2X)
LLC IN WELD COUNTY, COLORADO)

**PETITION FOR PARTIAL WAIVER OF ABANDONMENT
REGULATIONS AND FOR EXEMPTION
FROM STATUTORY REQUIREMENTS**

FREDERICK A. WEIS, et al.
COLORADO LANDOWNERS
IDENTIFIED IN APPENDIX 1
c/o Stewart, Wald & McCulley
2100 Central Street, Suite 22
Kansas City, MO 64108

Petitioners

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Attorneys for Petitioners

DATE FILED: October 15, 2021

BEFORE THE
SURFACE TRANSPORTATION BOARD

COLORADO LANDOWNERS --	)	
ADVERSE ABANDONMENT -- GREAT	)	DOCKET NO.
WESTERN RAILWAY OF COLORADO,	)	AB-857 (SUB-NO. 2X)
LLC IN WELD COUNTY, COLORADO	)	

**PETITION FOR PARTIAL WAIVER OF ABANDONMENT
REGULATIONS AND FOR EXEMPTION
FROM STATUTORY REQUIREMENTS**

Pursuant to 49 U.S.C. § 10502(a) and 49 C.F.R. § 1152.24(e)(5), the Colorado Landowners identified in the attached Appendix 1 hereby respectfully request that the Board:

(1) exempt them from requirements of certain statutory provisions whose application is not required to carry out the National Rail Policy, nor to protect shippers from abuse of market power; and

(2) waive certain Board regulations whose application is not required in a proceeding in which a party is seeking adverse abandonment of a rail line.

This proceeding is similar to Docket No. AB-1065 (Sub-No. 3), *Landowners -- Adverse Abandonment -- Indiana Southwestern Railway Co. in Posey and Vanderburgh Counties, Ind.*, decision served April 7, 2021 (*ISW case*), in which the Board granted exemptions from certain statutory provisions and waived certain regulatory requirements that normally apply when filing an application for abandonment authority, but are either unnecessary or would be difficult or impossible for a group of landowners to comply with if they were to file an application for adverse abandonment. The Colorado Landowners will be guided by that Board decision in its Petition in the current case.

IDENTITY AND INTEREST OF COLORADO LANDOWNERS

Attached to this Petition as Appendix 1 is a listing of the Colorado Landowners who join in the Petition. Each of the Colorado Landowners owns land that is adjacent to and/or within the right-of-way of the Subject Rail Line hereinafter identified. That land is burdened by easements that permit its use by Great Western Railway of Colorado, LLC (GWRC) for railroad purposes. The Subject Rail Line has not been used for Board-regulated rail transportation for 40 years and there is no realistic prospect for such use in the foreseeable future. The Colorado Landowners seek a determination by the Board that, under these facts and circumstances, public convenience and necessity (PC&N) require and permit abandonment of the Subject Rail Line, thereby extinguishing the federal interest in the Line, and paving the way for actions under Colorado law to free the land from the burden of the railroad easements.

BACKGROUND

THE SUBJECT RAIL LINE

The Subject Rail Line, referred to as the Welty Branch, extends between Milepost 0.0 at or near Johnstown, Colorado and the end of the stub-ended Line at Milepost 6.2 at or near Welty, Colorado, a distance of approximately 6.2 miles in Weld County, Colorado. The Line is shaded in yellow on a map of GWRC that is attached to this Petition as Appendix 2.

PRIOR ABANDONMENT PROCEEDING

GWRC is a wholly-owned subsidiary of OmniTRAX. GWRC operates approximately 80 miles of rail line in northeastern Colorado, including the Welty Branch, and is headquartered at Windsor, CO. The Welty Branch was constructed in the early 1900s to serve the sugar beet industry and is stub-ended at a location where a sugar beet dump was located 6.2 miles west of Johnstown, CO. There has been no regulated rail transportation, and the Line has not even been

maintained, since the sugar beet industry failed and closed in the late 1970's or early 1980's.

On April 16, 2008, GWRC filed a Notice of Exemption for abandonment of the Welty Branch under the class exemption at 49 C.F.R. § 1152.50 for abandonment of out-of-service rail lines, docketed as AB-857 (Sub-No. 1X), *Great Western Railway of Colorado, LLC -- Abandonment Exemption -- in Weld County, Colorado*. The abandonment authority in that docket became effective as scheduled. *Id*, 2008 WL 1993099, Notice served May 9, 2008. Instead of consummating that authority, GWRC sought and obtained a number of extensions of the one-year period for consummating authorized abandonments. GWRC ultimately wrote a letter to the Board on August 28, 2014, copy attached as Appendix 3, in which GWRC notified the Board that it had decided not to consummate the authorized abandonment, viz:

Due to recent industrial expansion in the area, GWRC hereby notifies the Board that it has decided to reopen the line that was authorized for abandonment in this proceeding. Consequently, GWRC will not be consummating the abandonment.

Contrary to any implication that industrial expansion in the area would result in transportation of Board-regulated rail transportation by GWRC, the Colorado Landowners will submit evidence to show that GWRC has not provided Board-regulated rail transportation over the Rail Line at any time after notifying the Board that it would not consummate the authorized abandonment. Thus, the absence of rail traffic subject to Board jurisdiction over the Line for 40 years is convincing evidence that PC&N requires and permits abandonment of the Subject Rail Line. *See also Denver & Rio Grande Railway Historical Foundation -- Adverse Abandonment -- in Mineral County, CO*, 2008 WL 2154898 (Docket No. AB-1014, decision served May 23, 2008) (PC&N required adverse abandonment where the subject rail line had not been used for Board-regulated rail transportation for more than 30 years).

REGULATIONS TO BE WAIVED AND STATUTES TO BE EXEMPTED

1. System Diagram Map

Waiver is sought of the provisions of 49 C.F.R. § 1152.22(a)(5), and the related provisions of 49 C.F.R. § 1152.10 through 14 and 49 C.F.R. § 1152.24(c)(1). Those provisions require reference to inclusion of the Subject Rail Line in the carrier's System Diagram Map (SDM) and related provisions. Waiver of SDM requirements is customary in adverse abandonment proceedings because the noncarrier applicant generally does not have access to a SDM. *See the ISW case, supra*, 2021 WL 1311918 at *3, and decisions there cited.

Exemption from the SDM provisions of 49 U.S.C. § 10903(c)(2) is also sought, as set forth, *infra*, providing statutory grounds for exemption.

2. Notice to Significant Users

Waiver is sought of 49 C.F.R. § 1152.20(a)(2)(i) that requires that notice of intent to abandon be sent to significant users of the line on the ground that no shippers are using the Line. *See the ISW case, supra*, 2021 WL 1311918 at *3, and the decisions there cited.

Exemption is also sought from the related provisions at 49 U.S.C. § 10903(a)(3)(D). *See infra*.

3. Notice to Amtrak

Waiver is sought of 49 C.F.R. § 1152.20(a)(2)(x), which requires that a notice of intent be served on the National Railroad Passenger Corporation (Amtrak). Amtrak does not operate on the rail line. *See the ISW case, supra*, 2021 WL 1311918 at *3, and the decisions there cited.

4. Notice to Labor Organizations

Waiver is sought of 49 C.F.R. § 1152.20(a)(2)(xii), which requires that a notice of intent be served on the headquarters of all duly qualified labor organizations that represent employees of the affected rail line, on the ground that there are no such labor organizations. *See the ISW case, supra*, 2021 WL 1311918 at *3, and the decisions there cited.

5. Posting Notice at Agency Stations or Terminals

Waiver is sought of 49 C.F.R. § 1152.20(a)(3) which requires posting of the notice of intent at each agency station or terminal on the line to be abandoned, on the ground that there are no agency stations at which the notice of intent could be posted. *See the ISW case, supra*, 2021 WL 1311918 at *4, and the decisions there cited.

Exemption is also sought from the related provisions of 49 U.S.C. § 10903(a)(3)(B). *See infra*.

6. Content of the Notice of Intent

Waiver is sought of the prescribed form of the Notice of Intent to abandon found at 49 C.F.R. § 1152.21, and approval of a modified Notice of Intent set out in Appendix 4 of this Petition, as amended in the *ISW case, supra*, 2021 WL 1311918 at *4, and the decisions there cited. Waiver is sought on the ground that the modified and amended Notice of Intent is in substantial compliance with the regulation. *Id.*

7. Line Attributes

Waiver is sought of 49 C.F.R. § 1152.22(b)-(d) and (e)(2)-(3), which require information regarding condition of the properties, service provided, revenue and cost data, and rural and community impact. That information is not typically available to adverse abandonment

applicants or has otherwise not been required of them. *See the ISW case, supra*, 2021 WL 1311918 at *4, and the decisions there cited.

8. Environmental and Historic Impacts

Waiver is sought of 49 C.F.R. § 1152.22(f) which requires the filing of an Environmental and Historic Report (EHR) in compliance with 49 C.F.R. § 1105.7 and 1105.8. Waiver is also sought of 49 C.F.R. § 1152.20(c) which requires service of those Reports on specified governmental agencies at least 20 days prior to filing an Abandonment Application.

Filing of an EHR should be waived because GWRC filed an EHR as part of its Notice of Exemption in Docket No. AB-857 (Sub-No. 1X) on April 16, 2008, and there has been no change in carrier operations since that time (that is, the Rail Line continues to be dormant). The Board issued an Environmental Assessment in that Docket. In the absence of rail operations over the Line, there is no need for additional environmental and historic reporting.

The requirement of filing an EHR in the present case should be waived notwithstanding the Board's refusal to waive that requirement in the *ISW case* (2021 WL 1311918 at *5) because the environmental and historic information in the 2008 EHR is current to date, and thus does not require re-analysis. *Compare* decisions cited in the *ISW case, supra*, 2021 WL 1311918 at *5.

9. Federal Register Notice

Waiver is sought of 49 C.F.R. § 1152.22(i) which provides wording for the draft Federal Register Notice. The Colorado Landowners propose to use alternative wording for that Notice that is reasonably acceptable in adverse abandonments (Appendix 5 of this Petition). The Board should find that the alternative wording substantially complies with the applicable regulation. *See the ISW case, supra*, 2021 WL 1311918 at *5, and the decisions there cited.

10. Offers of Financial Assistance

The Offer of Financial Assistance (OFA) regulations at 49 C.F.R. § 1152.27 should be waived, and the OFA provisions at 49 U.S.C. § 10904 should be exempted because if the Board were to find that PC&N requires or permits adverse abandonment of the Rail Line, it would be fundamentally inconsistent with the rationale underlying adverse abandonment to grant an OFA. *See the ISW case, supra*, 2021 WL 1311918 at *6, and the decisions there cited.

11. Exemptions

Exemption of the provisions of 49 U.S.C. § 10903(c)(2)(A) and (B) (SDMs); 49 U.S.C. § 10903(a)(3)(D) (Notice to Shippers); 49 U.S.C. § 10903(a)(3)(B) (Posting), and 49 U.S.C. § 10904 (OFAs) is sought on the ground that application of those provisions is not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101 and those provisions are not necessary to protect shippers from abuse of market power because the record indicates that no shippers are using the Line. *See the ISW case, supra*, 2021 WL 1311918 at *6, and the decisions there cited.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, the Board should waive compliance with the provisions of the cited regulations, and exempt compliance with the cited statutes.

Respectfully submitted,

FREDERICK A. WEIS, et al.
COLORADO LANDOWNERS
IDENTIFIED IN APPENDIX 1
c/o Stewart, Wald & McCulley
2100 Central Street, Suite 22
Kansas City, MO 64108

Petitioners

/s/ Thomas S. Stewart
/s/ Elizabeth G. McCulley

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/s/ Thomas F. McFarland

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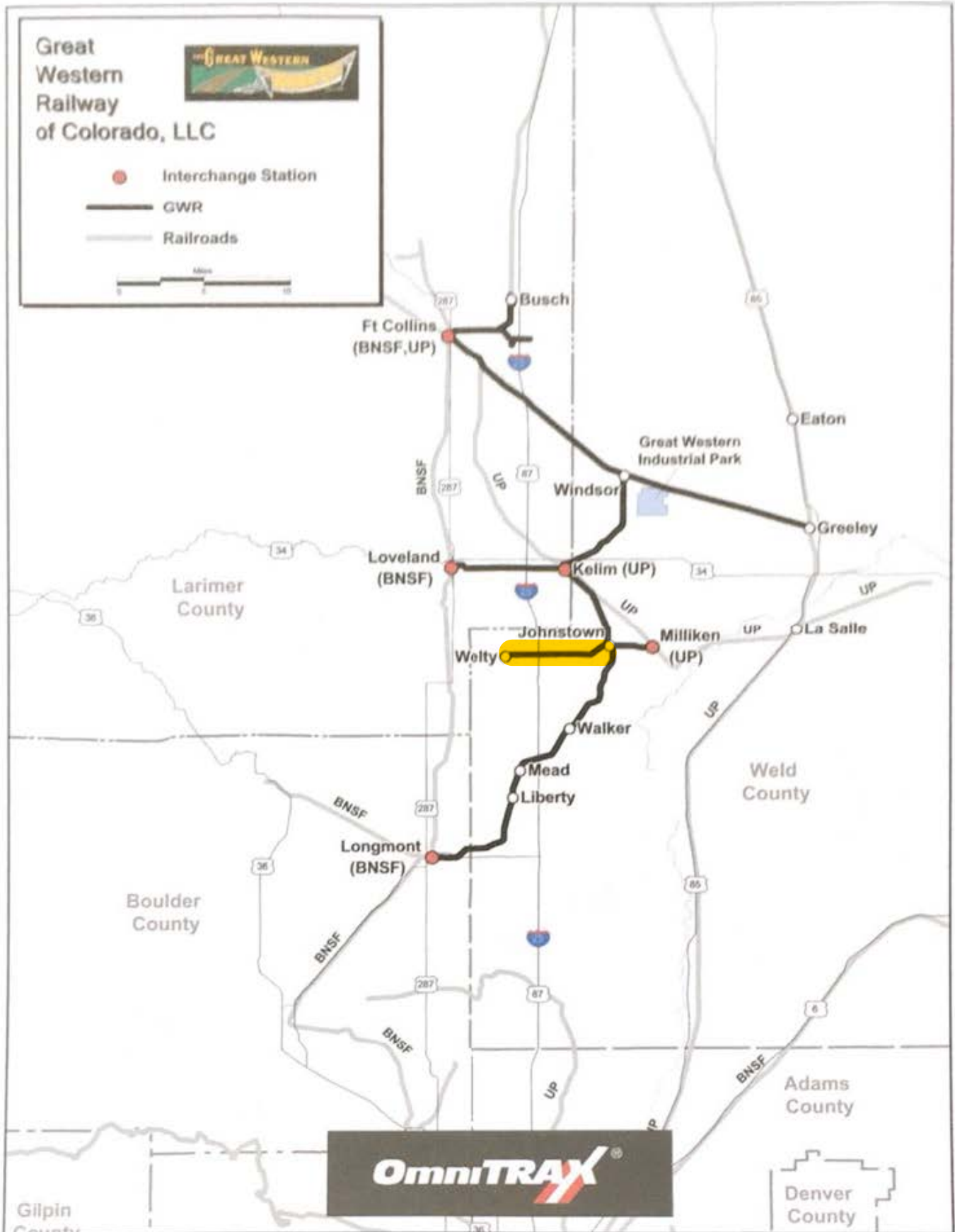
Attorneys for Petitioners

DATE FILED: October 15, 2021

Appendix 1

	Property Owner	Number of Parcels	Mailing Address
1	Fredrick A. & Diane K. Weis	4	15168 CR 7, Mead, CO 80542
2	Sauer Phantom 5 LLC	2	6681 CR 50, Johnstown, Co 80534
3	Zimmerman Brothers LP	2	3041 CR 46, Berthoud, CO 80513
4	Sauer West LLC	1	6681 CR 50, Johnstown, Co 80534
5	Sauer Whitehall LLC	1	6681 CR 50, Johnstown, Co 80534
6	Jimmy L. and Annette L. Larkin	1	1422 S. Vivian Way, Lakewood, CO 80228
7	Calvin and Donna Rae Lohnes	1	614 Country Acres Dr., Johnstown, CO 80534
8	Danielle (Blessing) Grauer	1	616 Aviara St., Johnstown, CO 80534
9	Suzanne (Tocchini) Fulkrod	1	2906 Falcon View Dr., Wellington, CO 80549
10	Amando and Anita Valdez	2	314 Charlotte St., Johnstown, CO 80534
11	Harry C. and Delores M. Peterson	1	6061 S. Aberdeen St., Littleton, CO 80120

Appendix 2





655 Fifteenth Street, NW, Suite 225
Washington, DC 20005
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Docket No. AB-857 (Sub-No. 2X)

Appendix 3

August 28, 2014

Karl Morell
Of Counsel
kmorell@balljanik.com

E-FILED

Cynthia Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E Street, SW
Washington, DC 20423

Re: STB Docket No. AB 857 (Sub-No. 1X), Great Western Railway of Colorado, LLC –
Abandonment Exemption – In Weld County, CO

Dear Ms. Brown

Great Western Railway of Colorado, LLC's ("GWRC") notice of exemption in this proceeding became effective on June 5, 2008.

By decision served June 10, 2009, the Board extended the time for GWRC to exercise the abandonment authority until May 6, 2010. By decision served May 3, 2010, the Board extended the time for GWRC to exercise the abandonment authority until May 6, 2011. By decision served May 5, 2011, the Board extended the time for GWRC to exercise the abandonment authority until May 6, 2012. By decision served April 20, 2012, the Board extended the time for GWRC to exercise the abandonment authority until May 6, 2013. By decision served May 1, 2013, the Board extended the time for GWRC to exercise the abandonment authority until May 6, 2014. By decision served April 28, 2014, the Board again extended the time for GWRC to exercise the abandonment authority until May 6, 2015.

Due to recent industrial expansion in the area, GWRC hereby notifies the Board that it has decided to reopen the line that was authorized for abandonment in this proceeding. Consequently, GWRC will not be consummating the abandonment.

Sincerely,

A handwritten signature in black ink that reads "Karl Morell". The signature is fluid and cursive, with the first letters of each word being capitalized and prominent.

Karl Morell
Of Counsel

Appendix 4

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C. 20423

STB Docket No. AB-857 (Sub-No. 2X)

**COLORADO LANDOWNERS -- ADVERSE ABANDONMENT --
GREAT WESTERN RAILWAY OF COLORADO, LLC
IN WELD COUNTY, COLORADO**

**NOTICE OF INTENT TO FILE AN APPLICATION
FOR ADVERSE ABANDONMENT**

The Colorado Landowners (“the Applicant”) give notice that on or about _____, 2021, they intend to file with the Surface Transportation Board, Washington, D.C. 20423, an Application for Adverse Abandonment of a line of railroad that extends between Milepost 0.0 at or near Johnstown, Colorado and the end of the stub-ended Line at Milepost 6.2 at or near Welty, Colorado, which traverses through United States Postal Service ZIP Codes 80534 and 80513, a distance of 6.2 miles, in Weld County, Colorado.

The reason for the proposed abandonment is to obtain a determination that public convenience and necessity require and permit abandonment of the federal interest in the Rail Line. The Colorado Landowners own land adjacent and/or within the rights-of-way of the subject Rail Line. That land is burdened by easements that permit its use by Great Western Railway of Colorado, LLC (GWRC) for railroad purposes. That land has not been used for

Board-regulated rail transportation for 40 years. There is no reasonable prospect for such use in the foreseeable future. A determination by the Board that public convenience and necessity permits and requires abandonment of the Rail Line in those circumstances would extinguish the federal interest in the Line, and pave the way for actions under Colorado law to free the land from the burden of the easements.

Based on information in the Colorado Landowners' possession, the Line does not contain federally granted rights-of-way. Any documentation in the Colorado Landowners' possession will be made available promptly to those requesting it.

To the extent that any railroad employees would be adversely affected by this action, their interest would be protected by the conditions imposed in *Oregon Short Line Railroad -- Abandonment, Goshen Branch*, 360 I.C.C. 91 (1979).

The Application can be viewed following its filing on the Board's website, www.stb.gov, or a copy can be obtained from Applicants' counsel whose name and address appear below. The Application will include the Applicant's entire case for abandonment. Any interested person, after the application is filed on or about _____, 2021, may file with the Surface Transportation Board written comments concerning the proposed abandonment or protests to it identifying it by the proceeding's docket number. These filings are due 45 days from the date of filing of the Application. Persons who oppose the abandonment but who do not wish to participate fully in the process by appearing at any oral hearings or by submitting verified statements of witnesses, containing detailed evidence, should file comments. Persons opposing the proposed abandonment that do wish to participate actively and fully in the process should file a protest. Protests must contain that party's entire case in opposition (case in chief) including the

following: (1) Protestant's name, address and business; (2) the protestant's interest in the proceeding including their use of the Lines or the public interest represented; (3) the protestant's reasons for protesting or commenting on the proposed abandonment including their reliance on the involved service; and (4) any rebuttal of material submitted in the Application.

Comments or protests need to be notarized or verified, and are required to be filed with the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board (Board), at 395 E Street, S.W., Washington, DC 20423, together with a certificate of service attesting that copies of the comments or protests have been served on Applicants' counsel in this matter, Thomas F. McFarland, Thomas F. McFarland, P.C., 2230 Marston Lane, Flossmoor, IL 60422-1336, mcfarland@aol.com, and Thomas S. Stewart and Elizabeth G. McCulley, Stewart, Wald & McCulley, 2100 Central Street, Suite 22, Kansas City, MO 64108, stewart@swem.legal, and mcculley@swm.legal. Written comments and protests must indicate the docket number, STB AB-857 (Sub-No. 2X).

Except as otherwise set forth in 49 C.F.R. § 1152, each document filed with the Board must be served on all parties to the abandonment proceeding. Comments and protests will be considered by the Board in determining what disposition to make of the Application. A commenting party or protestant may participate in the proceeding as its interests may appear.

If an oral hearing is desired, the requester must make a request for an oral hearing and provide reasons why an oral hearing is necessary. Oral hearing requests must be filed with the Board no later than 10 days after the Application is filed.

Those parties filing protests to the proposed abandonment should be prepared to participate actively either in an oral hearing or through the submission of their entire opposition

case in the form of verified statements and arguments at the time they file a protest. Parties seeking information concerning the filing of protests should refer to 49 C.F.R. § 1152.25.

Persons seeking further information concerning abandonment procedures may contact the Board's Office of Public Assistance, Government Assistance and Compliance at (202) 245-0230 or refer to the text of the abandonment regulations at 49 C.F.R. § 1152.1 et seq.

Appendix 5

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C. 20423

STB Docket No. AB-857 (Sub-No. 2X)

**COLORADO LANDOWNERS -- ADVERSE ABANDONMENT --
GREAT WESTERN RAILWAY OF COLORADO, LLC
IN WELD COUNTY, COLORADO**

FEDERAL REGISTER NOTICE

The Colorado Landowners (“the Applicant”) give notice that on or about _____, 2021, they intend to file with the Surface Transportation Board, Washington, D.C. 20423, an Application for Adverse Abandonment of a line of railroad that extends between Milepost 0.0 at or near Johnstown, Colorado and the end of the stub-ended Line at Milepost 6.2 at or near Welty, Colorado, which traverses through United States Postal Service ZIP Codes 80534 and 80513, a distance of 6.2 miles, in Weld County, Colorado.

To the Colorado Landowners’ knowledge, the Line does not contain federally granted rights-of-way. Any documentation on that subject in the Applicant’s possession will be made available promptly to those requesting it. The Application, when filed, can be viewed on the Board’s webpage, *www.stb.gov*, or a copy can be secured from Applicants’ counsel, whose name

and address appear below. The Applicants' entire case for abandonment will be filed with the Application.

The interest of railroad employees will be protected by the employee protective conditions imposed in *Oregon Short Line R. Co. - Abandonment - Goshen*, 360 I.C.C. 91 (1979).

Any interested person may file with the Surface Transportation Board its written comments, or protest concerning, the proposed abandonment within 45 days after the Application is filed identifying it by the proceeding's docket number. Persons who may oppose the abandonment but who do not wish to participate fully in the process by appearing at any oral hearings or by submitting verified statements of witnesses, containing detailed evidence should file comments. Persons opposing the proposed abandonment who wish to participate actively and fully in the process should file a protest. Protests must contain that party's entire case in opposition (case in chief) including the following: (1) the protestant's name, address and business, (2) the protestant's interest in the proceeding, including their use of the Lines or the public interest represented, (3) the protestant's reasons for protesting or commenting on the proposed abandonment, including their reliance on the involved service, and (4) any rebuttal of material submitted in the Application.

Written comments and protests must indicate the docket number of the proceeding, STB No. AB-857 (Sub-No. 2X) and should be filed with the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board (Board), at 395 E Street, S.W., Washington, DC 20423, no later than 45 days after the application is filed. Interested persons may file a written comment or protest with the Board to become a party to this abandonment proceeding. A copy of each written comment or protest, together with a certificate of service, should be served upon

the representatives of the Applicant, Thomas F. McFarland, Thomas F. McFarland, P.C., 2230 Marston Lane, Flossmoor, IL 60422-1336, mcfarland@aol.com, and Thomas S. Stewart and Elizabeth G. McCulley, Stewart, Wald & McCulley, 2100 Central Street, Suite 22, Kansas City, MO 64108, stewart@swm.legal, and mcculley@swm.legal. Except as otherwise set forth in 49 C.F.R. § 1152, each document filed with the Board must be served on all parties to the abandonment proceeding.

Persons seeking further information concerning abandonment procedures may contact the Board's Office of Public Assistance, Government Assistance and Compliance at (202) 245-0230 or refer to the text of the abandonment regulations at 49 C.F.R. § 1152.1, *et seq.*