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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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DOCKET NO. AB 857 (SUB-NO. 2)

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January 17, 2023  
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LANDOWNERS  
– ADVERSE ABANDONMENT –  
GREAT WESTERN RAILWAY OF COLORADO, LLC  
IN WELD COUNTY, CO

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ENVIRONMENTAL COMMENTS OF  
GREAT WESTERN RAILWAY OF COLORADO, LLC

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Karl Morell  
Karl Morell & Associates  
440 1<sup>st</sup> Street, N.W. Suite 440  
Washington, D.C. 20001  
(202) 595-9045  
karlm@karlmorell.com

Attorney for:  
Great Western Railway  
Of Colorado, LLC

Dated: January 14, 2023

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SURFACE TRANSPORTATION BOARD

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Great Western Railway of Colorado, LLC (“GWRC”) files these environmental comments in opposition to the application for adverse abandonment of GWRC’s Welty Branch located between milepost 0.0, at Johnstown, Colorado, and milepost 6.2, at Welty, Colorado (the “Line” or “Welty Branch”).

On August 1, 2022, the Landowners submitted for filing an Environmental Report and an Historic Report (“E&H Report”) in this proceeding that had been previously filed by GWRC in AB 857 (Sub-No. 3X) (the “Initial Report”). The Initial Report states that it was served on the entities listed on the service list included in the Notice of Intent (“NOI”). The NOI, filed on July 22, 2022, certifies that service was made on 15 individuals or entities. Only 3 of those 15 named individuals or entities are required to be served with an environmental report pursuant to 49 C.F.R. § 1105.7(b). By notice dated August 31, 2022, the Board’s Office of Environmental Analysis (“OEA”) found the Initial Report to be unacceptable. Because the Initial Report had not been prepared by

the Landowners but was misappropriated from the proceeding in AB 857 (Sub-No. 3X), OEA found the Report to be confusing and providing conflicting information. On September 7, 2022, the Board's Office of Proceedings issued a decision holding this proceeding in abeyance until 20 days after the Landowners file and serve a "revised" E&H Report. On September 13, 2022, six days after the Board's September 7<sup>th</sup> decision, the Landowners filed a "revised" E&H Report.

To date, the Landowners have submitted to the Board an E&H Report misappropriated from another proceeding and an allegedly revised version of the misappropriated report ("Revised Report"). No E&H Report independently prepared by the Landowners for this proceeding in compliance with the Board's rules has been filed by the Landowners. As OEA undoubtedly knows, it is simply not possible to prepare an environmental report in six days if one complies with the Board's regulations. Moreover, the planned proceeding in AB 857 (Sub-No. 3X) and this proceeding are fundamentally different in several significant respects. For example, the Landowners seek to have the Welty Branch salvaged whereas the Sub-No. 3 proceeding specifically sought to keep the rail line in place and the Landowners are opposed to rail banking whereas the sole purpose of the Sub-No. 3 proceeding was to rail bank the Line. Consequently, the environmental report prepared for the Sub-No. 3 proceeding, even with the nominal revisions made by the Landowners, cannot be deemed appropriate for this proceeding.

The Revised Report certifies that the Report was served in accordance with 49 C.F.R. § 1105.7(b) and § 1105.8(c). Attached to the Revised Report are eight letters, dated September 13, 2022, which presumably were used to serve the Revised Report.

Section 1105.7(b), however, requires service on at least 10 agencies and the attached letters were sent to only seven of those agencies.

On October 20, 2022, the Landowners filed a “timeline of service” where they allege that the Revised Report was served on seven agencies, only six of which are listed at Section 1105.7(b).<sup>1</sup>

On October 31, 2022, the Landowners submitted for filing an impermissible reply to a reply. In footnote 3 of that reply, the Landowners allege that the Revised Report was served on all agencies listed at 49 C.F.R. § 1105.7(d). On December 5, 2022, the Landowners filed a reply to GWRC’s Protest. Again, in footnote 3 of that reply the Landowners allege that the Revised Report was served on all agencies listed in Section 1105.7(d). There are, of course, no agencies listed at Section 1105.7(d).

To date, the Landowners have certified to the Board on more than one occasion that they are in full compliance with 49 C.F.R. § 1105.7(b), which requires the service of the environmental report on a minimum of 10 specified agencies. These certifications appear to be false since they are specifically contradicted by the Landowners on several occasions. For example, on one occasion they allege that eight of the 10 agencies were served, on another occasion they allege that seven agencies were served, and on two occasions they allege that no agency listed at Section 1105.7(b) was served. The Board

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<sup>1</sup> The Landowners also falsely allege that they served their Application on the undersigned on August 18, 2022. The undersigned has never been served with the Application which raises the question of how many other individuals or agencies have also not been served contrary to the representations of the Landowners. To date, the Board has failed to enforce its service of pleadings requirement at 49 C.F.R. § 1104.12, in this proceeding.

should not take these apparently false certifications lightly particularly since the Board specifically warned the Landowners to comply with Section 1105.7(b).

Pursuant to 49 U.S.C. § 1001, it is a federal crime to make a false statement to a government agency when it relates to a federal issue. The statement could be made verbally in person or in writing and does not have to be made under oath. Making false statements is a very serious crime. It is defined as an untrue statement knowingly made with the intent to mislead. GWRC suggests that the Board take appropriate disciplinary action or refer the matter to the Department of Justice for appropriate action. Such disciplinary action is appropriate to maintain the integrity of the Board's functions.

The Revised Report, like the Initial Report, is defective. Anyone seeking to file an abandonment application must certify that it has consulted with all appropriate agencies in preparing its environmental report and that those "consultations should be made far enough in advance to afford those agencies a reasonable opportunity to provide meaningful input." 49 C.F.R. § 1105.7(c). The Landowners have totally failed to comply with this requirement. The Revised Report is dated September 13, 2022. The eight letters purportedly sent by the Landowners to various agencies are also dated September 13, 2022. Consequently, no agency was able to provide any input, much less any meaningful input, to the Revised Report.

Moreover, the Landowners have not served copies of the Revised Report on all of agencies listed at 49 C.F.R. § 1105.7(b). The Landowners have also failed to comply with the requirements of 49 C.F.R. § 1105.7(d) since the Landowners failed to consult with any agency in preparing the Revised Report. Moreover, 49 C.F.R. § 1105.7 (e)(3)(i), (e)(3)(ii), (8), (9)(i), and (9)(ii) require a response in the environmental report to

be based on consultation with certain agencies. The Landowners have failed to make any such consultations. In addition, the Landowners have failed to comply with the requirements of 49 C.F.R. § 1105.11, since no transmittal letters were prepared or forwarded to the appropriate agencies. Also, the Revised Report was served on September 14<sup>th</sup> and not on September 13<sup>th</sup>, as represented to the Board.

On September 15, 2022, the Landowners filed a pleading claiming that on September 13<sup>th</sup> they had inadvertently omitted a letter to the Colorado SHPO and attached a copy of that letter. The attached letter to the SHPO, however, is dated September 15, 2022, and, therefore, could not have been inadvertently omitted in their September 13<sup>th</sup> filing, since that letter did not exist on September 13<sup>th</sup>. Once again, the Landowners are not being honest with the Board.

In addition to not serving all of the required agencies, the letters sent out by the Landowners contain a number of errors. For example, the letter to the U.S. Fish and Wildlife Service (“F&W”) asks the agency to identify any potential effects of the proposed abandonment on prime agricultural land. That agency does not have jurisdiction over prime agricultural land. Attached to the letter are email exchanges between counsel for GWRC and F&W in the Sub-No 3X proceeding. In so doing, the Landowners have intentionally misled that agency as to whether the infrastructure will remain in place.

In the Revised Report, the Landowners make numerous erroneous allegations. For example, the Landowners claim that “the Rail Line has not been maintained and, in addition to not being capable of handling rail traffic, is in a state of disrepair and is dangerous.” Revised Report at 2. As the Landowners well know, or should know if in

fact they are adjacent landowners, GWRC is nearing completion of significant repairs on the Welty Branch in preparation of handling a significant volume of traffic. *See* Exhibit 1 which contains recent photographs of the Welty Branch and demonstrates the totally outdated and misleading nature of the photographs set forth by the Landowners in their Application. The Landowners are either not owners of lands adjacent to the Welty Branch or they are aware of the extensive repairs that have been made to the Welty Branch during the past year and, once again, are not being honest with the Board. The Landowners next falsely allege that the “proposed abandonment will have no impact on regional or local transportation systems or patterns.” GWRC’s soon to be completed track repairs will enable the transloading of freight traffic over the Welty Branch that previously moved by truck or represents new rail traffic growth in the northern Colorado region. Therefore, the proposed abandonment will have a significant impact on local and regional transportation systems.

The Landowners also falsely allege that the Welty Branch “cannot transport goods anywhere and has laid in waste.” Revised Report at 4. The photographs in Exhibit 1 and GWRC’s negotiations with G4 Energy and Rocky Mountain Transload, Inc., refute the allegation that goods cannot be transported over the Welty Branch.

In addition, the Landowners have failed to comply with the requirements of 49 C.F.R. § 1105.11, since no transmittal letters were prepared or forwarded to the appropriate agencies.

On December 14, 2022, OEA served its Draft Environmental Assessment (“Draft EA”). Based on the false representations made by the Landowners in the Revised Report, the Draft EA reaches several erroneous conclusions. As already noted, the Revised

Report was not served on all of the appropriate federal, state, and local agencies. *See* Draft EA at 2. Future use of the Line is neither impossible nor cost prohibitive. *See* Draft EA at 2. The “Line has been used only for rail car storage between 2008 and 2016.” Draft EA at 3. The Verified Statement of Cynthia Sauer, attached to the Application, notes that the entire Line was used to store rail cars in 2016 and 2017. The “proposed adverse abandonment would not adversely impact the development, use and transportation of energy resources...or result in the diversion of rail traffic to truck traffic....” Draft EA at 3. At least one or two customers are in the process of establishing a transload adjacent to the Welty Branch, reducing their truck traffic.

Throughout their numerous filings in this proceeding, the Landowners have conveniently ignored the fact that GWRC is spending about \$1 million to rehabilitate the Welty Branch. GWRC would not have made such a substantial investment unless it was convinced that the traffic projections were realistic and the revenues from that traffic justified the expenditures.

GWRC has secured and installed approximately 4,000 railroad crossties and 800 tons of track ballast along the Welty Branch. GWRC has also commenced the process of restoring right of way drainage. Additionally, roughly 5,000 linear feet of rail, including other track material such as plates, joint bars, and spikes have been delivered for the GWRC’s ongoing improvements of the Line. After all of the rail has been installed, additional ballast will be installed, specific at-grade crossings will be replaced, and the entire Welty Branch will be surfaced by on-track equipment. Such repair work would have been completed in late 2022 but for extreme weather conditions delaying track work.

GWRC is in ongoing negotiations with G4 Energy and Rocky Mountain Transloading to establish at least one rail-served transload location on the Welty Branch. These negotiations will be completed prior to completion of track repair and GWRC fully expects moving loaded freight railcars over the Welty Branch in early 2023.

The Board is required to consider the environmental and energy impacts of the proposed abandonment. The Landowners have the burden of submitting the information that the Board's environmental regulations require.

It has become painfully obvious that the Landowners are unwilling or unable to comply with the Board's rules. The Landowners also appear incapable of being honest with the Board. As demonstrated above, the Landowners have made a mockery of the Board's rules and have woefully failed to meet their statutory obligations.

As is demonstrated above and in prior filings by GWRC, the Landowners are virtually in total non-compliance with the Board's applicable rules. Consequently, the Application should be rejected or summarily denied.

Respectfully submitted,



Karl Morell  
Karl Morell & Associates  
440 1<sup>st</sup> Street N.W., Suite 440  
Washington, D.C. 20001  
(202) 638-3307

Attorney for: Great Western Railway  
Of Colorado, LLC

Dated: January 14, 2023

cc: All parties of record

EXHIBIT 1

