

SERVICE DATE – MAY 19, 2023

**SURFACE TRANSPORTATION BOARD
WASHINGTON, DC 20423**

FINAL ENVIRONMENTAL ASSESSMENT

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

**Colorado Landowners—Adverse Abandonment—
Great Western Railway of Colorado, LLC in Weld County, Colo.**

ABANDONMENT TYPE

The time for comments on the Draft Environmental Assessment (Draft EA) has expired in this:

() Notice of Exemption () Petition for Exemption (X) Regulated Abandonment

() **NO NEW COMMENTS WERE RECEIVED**

(X) **NEW COMMENTS WERE RECEIVED**

In this proceeding, a group of 27 landowners (Landowners)¹ filed an application² under 49 U.S.C. § 10903 and 49 C.F.R. § 1152.22 requesting that the Surface Transportation Board (Board) authorize the third-party, or adverse, abandonment of 6.2 miles of rail line extending from milepost 0.0 at Johnstown, Colorado, to milepost 6.2 near Welty, Colorado (the Line), owned by Great Western Railway of Colorado, LLC (GWRC). The Office of Environmental Analysis (OEA) served a Draft EA for this proceeding on December 14, 2022 for public review and comment. In the Draft EA, OEA recommended one environmental condition and concluded that the proposed action would not significantly impact the quality of the human environment.

Comments on the Draft EA

OEA received two comments after issuance of the Draft EA. By email dated January 13, 2023, the Northern Cheyenne Tribe requested a copy of the Draft EA and asked whether a cultural resources report was available for review. OEA subsequently provided the requested information, including correspondence between GWRC and the Colorado Historical Society (State Historic Preservation Officer or SHPO) regarding the results of a 2008 cultural survey that

¹ The 27 landowners are listed in Appendix 1 of the application.

² The application is considered filed on October 5, 2022, 20 days after the Landowners filed a revised environmental and historic report (Revised E&H Report) on September 15, 2022. Landowners initially filed the Revised E&H Report on September 13, 2022 but inadvertently excluded an agency and filed a supplement two days later explaining the omission and including the agency. See Colo. Landowners—Adverse Aban.—Great W. Ry. of Colo., LLC, in Weld Cnty., Colo., AB 857 (Sub-No. 2) (STB served Sept. 7, 2022).

had been conducted on the same Line in abandonment Docket No. AB 857 (Sub-No. 1X). The survey found that the Line was eligible for listing in the National Register of Historic Places due to its prior association with the sugar beet industry. However, the SHPO concluded that the proposed abandonment would have no adverse effect on historic resources based on GWRC's plans to railbank the Line. GWRC filed the notice of exemption in the Sub-No. 1X docket with the Board in 2008 but never consummated after trail use negotiations failed. To date, OEA has not received any follow-up requests or comments from the Tribe.

On January 17, 2023, GWRC filed environmental comments in opposition to the Landowners' application and raised several alleged issues with the Revised E&H Report and the Draft EA.

GWRC's Comments on the Revised E&H Report:

First, GWRC contends that much of the information in the Landowners' Revised E&H Report was taken from an earlier E&H Report that GWRC submitted to the Board for a planned, but never filed, abandonment of the same Line in Docket No. AB 857 (Sub-No. 3X). GWRC claims that Landowners updated GWRC's E&H Report with information specific to Landowners' proposed adverse abandonment but also retained information GWRC provided in the Sub-No. 3X docket even though the proposals are allegedly inherently different. Specifically, GWRC states that the Revised E&H Report includes conflicting information on Landowners' intent to dispose of the right-of-way and GWRC's intent to retain the right-of-way through railbanking.

OEA agrees that Landowners included conflicting information about the disposition of the Line in their Revised E&H Report. Applicants in adverse abandonment proceedings may not always have access to information regarding railroad rights-of-way (ROW) proposed for adverse abandonment because adverse applicants typically do not have access or control of the rail line. However, accurate information regarding disposition of the right-of-way and any proposed abandonment-related salvage is necessary to conduct a meaningful environmental review. Therefore, OEA rightfully accepted the Revised E&H Report, even though it included information that the adverse Applicants learned from the earlier GWRC report. Moreover, OEA rejected Landowners initial E&H Report filed on August 1, 2022 and instructed Landowners to submit an updated E&H Report that clearly describes the Landowners' future plans for the rail ROW, and specifically whether salvage or rail banking would occur. On September 15, 2022, Landowners filed their Revised E&H Report and provided the requested clarification on page 2 regarding disposition of the Line. Thus, the Revised E&H Report adequately addressed Landowners intended disposition of the rail ROW and clarified Landowners' position.

GWRC also argues that Landowners included agency correspondence from GWRC's earlier E&H Report in the Sub-No. 3X docket in their Revised E&H Report, and specifically included email exchanges between GWRC and the U.S. Fish and Wildlife Service (USFWS) discussing GWRC's intent to railbank the Line, as well as trail use references to GWRC's earlier Sub-No. 1X docket. However, as the Draft EA stated, Landowners served the Revised E&H Report on the appropriate federal, state, and local agencies and adequately explained that they were pursuing a different action, adverse abandonment, in a different docket. To date, OEA has

not received any additional comments other than the two discussed above. Accordingly, the Revised E&H Report adequately conveyed the necessary information for the agencies to conduct a review of the potential impacts of the proposed adverse abandonment and provide OEA with comments.

Second, GWRC argues that Landowners failed to comply with 49 C.F.R § 1105.7(c), which requires applicants to certify to the Board that they have sent copies of the environmental report to the agencies listed and have consulted with all appropriate agencies in preparing the report. The regulation also states that these consultations should occur far enough in advance to allow those agencies a “reasonable opportunity to provide meaningful input.” 49 C.F.R § 1105.7(c). GWRC argues that the Revised E&H Report is dated September 13, 2022, as are the eight letters the Landowners purportedly sent to various agencies, and thus the agencies were not able to provide meaningful input.

Following OEA’s August 31, 2022 rejection of Landowners’ initial E&H Report, on September 7, 2022, the Board served a decision holding the proceeding in abeyance until 20 days after the Landowners filed and served a revised E&H Report on the required federal, state and local agencies, pursuant to 49 C.F.R. §§ 1105.7(b) and 1105.8(c). Landowners filed an amendment on September 15, 2022, correcting an omission to its Revised E&H Report filed on September 13, 2022, which resulted in the filing date of October 5, 2022 - 20 days after September 15, 2022. Thus, the federal, state and local agencies were provided the required 20-day notice contemplated under the Board’s regulations. Moreover, OEA notes that the Colorado State Historic Preservation Officer and the U.S. Army Corps of Engineers, Omaha District (the Corps) had enough time to review the information and provide comments on the Revised E&H Report before the Draft EA was issued on December 14, 2022.

Third, GWRC argues that Landowners failed to comply with 49 C.F.R § 1105.7(b) by not serving the environmental report on the required agencies. OEA recognizes that Landowners failed to include the required certificate of service with the September 15, 2022 Revised E&H Report, per 49 C.F.R §§ 1105.7(b) and 1105.8(c). However, on October 20, 2022, Landowners filed a letter certifying that they had, in fact, served the required agencies. Landowners sent copies of the Revised E&H Report to the required agencies with the exception of the U.S. Environmental Protection Agency (USEPA) and the National Geodetic Survey (NGS).³ However, OEA notes that the State of Colorado administers USEPA’s Clean Water Act discharge permitting program through its Department of Public Health & Environment,⁴ and the Revised E&H Report was served on this agency. NGS commented in the AB 857 (Sub-No. 1X) docket that no geodetic markers were located in the area of the proposed abandonment. Therefore, no geodetic markers are located in the area of the proposed adverse abandonment and no further consultation is necessary. In addition, OEA included all of the agencies, including NGS, in the non-party service list to receive the Draft EA for review and comment. To date, OEA has not received any comments from NGS.

³ There is no coastal zone in Colorado, and appropriately, no State Coastal Zone Office. Thus, 49 C.F.R § 1105.7(b)(3) does not apply.

⁴ <https://cdphe.colorado.gov/COR400000-stormwater-discharge>

Fourth, GWRC argues that Landowners incorrectly concluded that the proposed abandonment would have no impact on regional or local transportation systems or patterns even though GWRC has filed comments in this proceeding indicating that its soon-to-be completed track repairs will enable existing truck traffic to be diverted to rail traffic over the Welty Branch (which includes the Line) and this represents new rail traffic growth in the northern Colorado region. Based on this updated information, GWRC contends that the Revised E&H report should have concluded that the proposed adverse abandonment would have a significant impact on local and regional transportation systems. As noted above, however, adverse applicants often do not have access to the same information as the rail carrier on the line. Nevertheless, based on GWRC's explanation of rehabilitation efforts and ongoing negotiations to establish a rail-served transload location on the Welty Branch, OEA is modifying language in the Draft EA appropriately to include information on GWRC's future plans for the Line.

Fifth, GWRC argues that the letters sent to agencies by Landowners contain several errors. GWRC states that the letter to USFWS asks the agency to identify any potential effects of the proposed adverse abandonment on "prime agricultural land" even though it does not have jurisdiction over prime agricultural land. GWRC also states that Landowners' letter included email exchanges between GWRC and USFWS discussing railbanking rather than Landowners' planned removal of infrastructure and track material. OEA believes the mistaken reference to "prime agricultural land" is likely the result of a minor administrative error. Regarding the email exchanges, Landowners explained that USFWS previously provided its comments to GWRC (and included them in their Revised E&H Report) and that Landowners were now requesting comments on their proposed adverse abandonment. Landowners also certified that they sent USFWS the Revised E&H Report, which adequately conveys that the track and associated materials would be removed and salvaged, and therefore the adverse abandonment is a different action from GWRC's prior proposed abandonment. Moreover, OEA notes that the Draft EA concluded that salvage of the Line would have "no effect" on USFWS listed species. OEA included USFWS in the non-party service list to receive the Draft EA for review and comment, and to date, has not received any additional comments from USFWS.

Lastly, GWRC argues that Landowners failed to comply with the requirements of 49 C.F.R. § 1105.7(d). GWRC mistakenly asserts that this regulation requires applicants to consult with and include agency comments in the E&H Report prior to submitting the report to the Board. However, § 1105.7(d) only requires any documentation of responses to be attached as well as summaries and contact information for any oral responses received. In addition, in order to ensure consideration of all comments received during the environmental review process, it has been OEA's longstanding practice to accept comments and responses from agencies after an E&H report is received and to take such comments and responses into consideration in the Draft or Final EA.

GWRC's Comments on the Draft EA:

GWRC claims that the Draft EA reached several erroneous conclusions on potential transportation and energy impacts based on Landowners' Revised E&H Report. Specifically, GWRC states that the following sentences need to be corrected: 1) Page 1, "Line has been used only for rail car storage between 2008 and 2016;" 2) Page 2, "future use of the Line would be

impossible if not cost prohibitive;" 3) Page 2, "The Revised E&H Report was served on all of the appropriate federal, state, and local agencies;" and 4) Page 3, "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." OEA will modify the Draft EA in this Final EA to include updated information on GWRC's first two (1 & 2) requested changes. The last two requested changes (3 & 4) were addressed in OEA's responses above.

Modifications to the Draft EA

Upon review of the comments received, OEA is modifying the Draft EA to include the following language in the Draft EA. OEA recommends that the two statements on pages 1 – 2 of the Draft EA be amended as follows:

Amend this phrase:

"...the Line has been used only for random and sporadic rail car storage between 2008 and 2016."

By adding:

"However, GWRC indicates that the entire Line was used to store rail cars in 2016 and 2017."

To read:

"... the Line has been used only for random and sporadic rail car storage between 2008 and 2016. However, GWRC indicates that the entire Line was used to store rail cars in 2016 and 2017."

Amend this sentence:

"The Landowners further claim that GWRC has not maintained the right-of-way and that future use of the Line for rail transportation would be impossible if not cost prohibitive."

By adding:

"However, GWRC states that it is nearing completion of significant repairs on the Welty Branch in preparation of handling a significant volume of traffic."

To read:

"The Landowners further claim that GWRC has not maintained the right-of-way and that future use of the Line for rail transportation would be impossible if not cost prohibitive. However, GWRC states that it is nearing completion of significant repairs on the Welty Branch in preparation of handling a significant volume of traffic."

Conclusions

The Draft EA comment period has ended. Accordingly, OEA recommends that the following condition previously recommended in the Draft EA should be imposed upon any decision granting abandonment authority.⁵

All parties, including the Great Western Railway of Colorado, LLC (GWRC) and the 27 Landowners, shall retain their interest in and take no steps to alter the historic integrity of all historic properties including sites, buildings, structures, and objects within the project right-of-way (the Area of Potential Effect) that are eligible for listing or listed in the National Register of Historic Places until the Section 106 process of the National Historic Preservation Act, 54 U.S.C. § 306108, has been completed. A consummation notice may not be filed, and salvage activities related to abandonment (including removal of tracks and ties) may not be initiated until the Section 106 process has been completed and the Board has removed this condition.

If the above condition is imposed, OEA believes that the proposed action will not significantly affect the quality of the human environment.

By the Board, Danielle Gosselin, Director, Office of Environmental Analysis.

⁵ If an interim trail use agreement under 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29 were to be reached for the Line (or a portion thereof), compliance with this condition would not be required with respect to any portion of the Line covered by the interim trail use agreement for the duration of the agreement.