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

ENTERED
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August 23, 2016
Part of
Public Record

STB Docket No. FD 36040

NEWVISTA PROPERTY HOLDINGS, LLC
PETITION FOR DECLARATORY ORDER

OPENING STATEMENT



Respectfully Submitted,

Carl J. Belliston
Attorney for NewVistas Property Holdings, LLC
2365 Mountain Vista Lane, Provo, UT 84606
801-376-2210

BEFORE THE
SURFACE TRANSPORTATION BOARD
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OPENING STATEMENT

A. Procedural Background

On March 1, 2016, NewVistas Property Holdings, LLC, a Utah limited liability company (“Petitioner”) sought waiver of certain requirements of the Surface Transportation Board (“STB”) abandonment regulations for an intended adverse abandonment application related to an inactive line of railroad believed to be owned by the Union Pacific Railroad (“UPR”), running approximately 1.8 miles in Provo City, Utah County, State of Utah, commencing at UPR’s Sharp Subdivision (milepost 0.0), crossing UPR’s Provo Subdivision between mileposts 0.64 and 0.71, and stub-ending at milepost 1.87 (referred to herein as the “Ironton Branch”). (At the time of filing, the name of the Petitioner was “NewVista Property Holdings, LLC,” but its name was changed to “NewVistas Property Holdings, LLC” effective as of May 18, 2016.) The waiver petition was assigned STB Docket No. AB 1241.

UPR responded to Petitioner’s waiver petition by arguing that the STB has no authority to consider an application for adverse abandonment in connection with the Ironton Branch, because the Ironton Branch is “excepted” yard track.

Petitioner filed a reply to UPR’s response and requested, if the STB denied the Petitioner’s intended adverse abandonment application, a declaratory order stating clearly that the STB has authority to adversely abandon the Ironton Branch, or, alternatively, that the Ironton

Branch is no longer part of the national rail system and that the STB has no jurisdiction over it. If the Ironton Branch has been taken outside the authority of the STB because an abandonment already has been consummated, Petitioner requested a declaratory order so stating.

The STB issued a decision denying Petitioner's petition for waiver (STB Docket No. AB 1241), stating that yard track "is not subject to the Board's § 10903 abandonment authority" and "is likewise excepted from the Board's adverse abandonment process." The STB simultaneously recognized the existence of a controversy subject to its authority to issue a declaratory order under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 and instituted this declaratory order proceeding to consider the Petitioner's above-stated requests.

B. Relevant Facts and the Fox Case

On June 20, 2008, another owner of property abutting the Ironton Branch filed a petition with the STB seeking a declaration that the Ironton Branch had in fact been abandoned by UPR pursuant to an authorization granted by the ICC in 1977 and that the Ironton Branch no longer was subject to the STB's jurisdiction. See Joseph R. Fox—Petition for Declaratory Order, STB Docket No. FD-35161 (served May 18, 2009) (the "Fox Case"). The ICC authorization was set out in a Certificate and Order issued pursuant to abandonment proceedings, which resulted in discontinuation of common carrier operations over the Ironton Branch and the classification of relevant portions of the Ironton Branch as yard track.

The effect of the "yard track" classification was to allow UPR to operate or abandon the track without having to obtain any further authority from the STB. Id. at 2. As the STB has ruled in Docket No. AB 1241, the classification also excepted the Ironton Branch from the STB's adverse abandonment process.

The petitioner in the Fox Case alleged that the Ironton Branch was in disrepair and was not being used. Those allegations were not contradicted by UPR. However, UPR asserted, and the STB found, that UPR had used portions of the Ironton Branch in the then-recent past for staging and storing rail equipment and other purposes and was actively seeking new customers to use the line in the future. The STB observed:

Historically, to determine whether a railroad has exercised permissive abandonment authority by “consummating” an abandonment authorized by the Board or the ICC, the agency looked at whether a railroad manifested a clear intent, through its statements and actions, to terminate permanently its common carrier service obligation with respect to the line rather than discontinue operations temporarily. Under current Board regulations in effect since 1977, the filing of a “notice of consummation” is deemed to be conclusive of whether a line has been abandoned.

Id. at 3 (footnotes omitted). Based on those observations, the STB ruled that the relevant portions of the Ironton Branch were “still within the national rail network,” id. at 2, and still within the exclusive jurisdiction of the STB under 49 U.S.C. § 10501(b)(2), id. at 3. Accordingly, the petitioner in the Fox Case was not allowed to prosecute an action in state court seeking an injunction that would require UPR to remove the track along the Ironton Branch and (presumably) relinquish its right of way.

More than seven years have passed since the STB’s decision in the Fox Case. Petitioner owns, or controls, nearly all of the industrial property that abuts the Ironton Branch. There are no stations on the Ironton Branch, and, to the best knowledge, information, and belief of Petitioner, the Ironton Branch does not include any federally granted rights-of-way. Petitioner believes that there are no existing or potential customers located anywhere along the line. The line remains in disrepair and is unusable; the line is disconnected from the main line at the UPR’s Sharp Subdivision; the crossing signal at about milepost 0.64 has been removed; the tracks at about milepost 1.25, where the line crosses Ironton Blvd., have been removed, and to

Petitioner's best knowledge, information, and belief, the UPR has not obtained any customers for the line for more than a decade.

To the best knowledge and belief of Petitioner, the Ironton Branch was not being used for any railroad purposes at the time of the Fox Case, has not been used for any railroad purposes since the STB's decision in the Fox Case, and has no prospect of use for any future new customer of UPR. See attached affidavit at Exhibit A. Currently, the Ironton Branch presents a substantial environmental hazard and impediment to commercial development appropriate to the area, and serves no national or local useful public service as a railroad line, warranting circumstances appropriate for abandonment.

C. Abandonment of Un-Needed Rail Lines

The Fox Case dealt with "permissive" abandonment, which is an action initiated by a railroad desiring to rid itself of obligations relating to a stretch of track. The STB regulations also provide for third-party "adverse" abandonment, which may be initiated by a third party to remove track from the national rail system and require a railroad to abandon the track. Any person with a "proper interest" may bring such an application. See Jacksonville Port Authority - Adverse Discontinuance in Duval County, FL, STB Docket No. AB-469 (served July 17, 1996) at 5. The purpose of the adverse abandonment process is to prevent a railroad from blocking useful development by holding onto its rights in an un-needed right-of-way and to force the railroad to consummate an abandonment.

Although the STB has held in STB Docket No. AB 1241 that the Ironton Branch is excepted from the STB's adverse abandonment process, the public policy underlying that process remains highly relevant to this case. Petitioner submits that adverse abandonment or its equivalent is appropriate under the facts of this case through a declaratory order.

Both permissive abandonment and adverse abandonment require similar processes before the STB, but many of the normal requirements pertaining to permissive abandonment are not applied in cases of adverse abandonment. See, e.g., Riverview Trenton Railroad Company – Adverse Abandonment – In Wayne County Mich, STB Docket No. AB 1230 (served April 10, 2015); City of Rochelle, Illinois – Adverse Discontinuance – Rochelle Railroad Company, STB Docket No. AB-549 (SIB served June 5, 1998); Grand Trunk Western Railroad Incorporated – Adverse Discontinuance of Trackage Rights Application – A Line of Norfolk and Western Railway Company in Cincinnati, Hamilton County, OH. STB Docket No. AB-31 (Sub No. 30) (served Feb. 13, 1998). In the instant case, a determination already has been made by the ICC that the Ironton Branch is not needed as part of the national rail system, except to the extent of UPR’s needs for yard track purposes. Accordingly, a full abandonment proceeding is not required. However, the STB retains jurisdiction to issue orders that will achieve the purposes of the regulatory framework governing the national rail system, including orders pertaining to the consummation of abandonment authority that already has been granted.

The law pertaining to adverse abandonment establishes that track should be removed from the national rail system if the present or future public convenience and necessity require or permit the proposed abandonment. Stewartstown Railroad Company – Adverse Abandonment – In York County, PA, STB Docket No. AB 1071 (served November 14, 2012); Norfolk Southern Railway Company – Adverse Abandonment – St. Joseph County, Ind, STB Docket No. AB 290-286 (served April 17, 2012). In making the determination, the STB balances the competing benefits and burdens on all interested parties. The objective is to open the way for land to be used productively and beneficially when a railroad is making no use, or only minor use, of a

stretch of track, and the track is not needed as part of the national rail system. The STB has explained:

[W]e typically preserve and promote continued rail service where a carrier has expressed a desire to continue operations and has taken reasonable steps to acquire traffic. On the other hand, we do not allow our jurisdiction to be used to shield a line from the legitimate processes of state law where no overriding federal interest exists. If we grant an adverse abandonment, our decision removes the shield of our jurisdiction, enabling the applicant to pursue other legal remedies to force the carrier off a line and sell or dispose of railroad property that would otherwise be protected as part of the national rail transportation system.

Stewartstown Railroad, *supra* at 4-5 (citations omitted). See also Minnesota Commercial Railway Company – Adverse Discontinuance – In Ramsey County, MN, STB Docket No. AB-882 (served July 16, 2008) at 3.

The applicability of this same standard in connection with excepted yard track is made clear in Pinelawn Cemetery – Petition for Declaratory Order, FD 35468 (served Apr. 21, 2015). In that case, a cemetery sought a ruling that certain excepted track was in fact private track outside the STB’s jurisdiction. The STB stated that “Pinelawn could not force the Railroads off the property *unless it seeks and receives a ruling from the Board concluding that the property is not needed as part of the national rail system.*” *Id.* at 2 (emphasis added). The clear implication of this language is that the STB has the authority to issue such a ruling in relation to yard track.

The public policy interest in this case is reinforced by the language of the deeds granting the railroad right-of-way along the Ironton Branch. See copies attached as Exhibit B. The deed dated June 19, 1926 grants a “right of way and easement for all railroad purposes.” The deed dated March 5, 1931 states that the subject land “is conveyed unto said Grantee for trackage purposes, and in the event that any portion thereof shall be abandoned for trackage purposes, such portion shall revert to the Grantor.” These conveyances clearly do not contemplate that a

railroad may squat on the property in perpetuity and block other useful development after there is no genuine need to maintain the right-of-way for railroad purposes. UPR has no legitimate interest to hold the property except as needed for railroad purposes.

Petitioner respectfully submits that the Ironton Branch is not being used for any rail purposes by UPR and, in any event, is not needed as part of the national rail system. A balancing of interests in this case does not justify UPR's right to obstruct environmental cleanup and development of the land underlying the Ironton Branch merely by claiming that it might use the track at some time in the future or by rolling a caboose onto the track from time to time.

D. Abandonment of the Ironton Branch by Declaratory Order

An abandonment process was completed before the ICC in 1977, and all regulatory requirements for abandonment of the Ironton Branch were satisfied in that process. When the ICC delivered its Certificate and Order, it effectively determined that the Ironton Branch was not needed as part of the national rail system, subject to UPR's requirements. The Certificate and Order therefore authorized the railroad to abandon the line by filing a notice of consummation. The STB has indicated in its Pinelawn decision, that consummation of such an abandonment in the case of excepted track can be forced by a third party, presumably based on the same standards as apply to adverse abandonment. The STB has stated that the "proper vehicle" for STB action in this case is a declaratory order proceeding.

Petitioner respectfully submits that the STB has jurisdiction to terminate this controversy by ordering an abandonment, either by a notice of consummation or without the requirement of such a notice, without the need for an adverse abandonment process. Based on UPR's non-use of the Ironton Branch for more than a decade and Petitioner's ownership of substantially all

property abutting the Ironton Branch and Petitioner's inability to fully develop the property so long as UPR holds a railroad right-of-way, such an order is appropriate in this case.

E. Declaration of Permissive Abandonment

The petitioner in the Fox Case requested a factual determination that UPR had consummated an abandonment of the Ironton Branch as authorized by the earlier ICC Certificate and Order, and a declaratory order stating that the STB no longer had jurisdiction over the Ironton Branch. On the basis of then-recent activities of UPR, the STB denied the petitioner's requested order.

Petitioner respectfully submits that the STB may terminate this controversy essentially in the same way requested in the Fox Case. Based on another seven years of non-use since the Fox Case and no prospects for future customers (since Petitioner owns substantially all of the property abutting the Ironton Branch), a declaration is appropriate in this case that UPR has effectively consummated an abandonment of the Ironton Branch; that the Ironton Branch is removed from the national rail system; and that the STB has no further jurisdiction over the Ironton Branch.

F. Declaration of Relinquishment of Jurisdiction

If the STB holds that it does not have authority to order an abandonment of the Ironton Branch and that UPR has not consummated an abandonment as authorized in the 1977 ICC Certificate and Order, Petitioner respectfully submits that the STB nevertheless has jurisdiction to terminate this controversy by a declaration stating that UPR is no longer using the Ironton Branch for trackage or other railroad purposes; that the Ironton Branch is not needed as part of the national rail system; and that the STB therefore relinquishes its exclusive jurisdiction over the Ironton Branch. One of these three avenues must be available, because any other conclusion

would allow a railroad to obtain *authorization* to abandon a line and thereby obtain the right forever to squat on the underlying land and defeat any action to *require* abandonment for any reason, because it is immune from responsibility in state or federal court (by virtue of the jurisdictional shield afforded by the STB's exclusive jurisdiction) and immune from any action before the STB (by virtue of the conclusion that yard track it outside the adverse abandonment authority of the STB).

A determination already has been made that the Ironton Branch is not needed as part of the national rail system if it is not being used for rail purposes by UPR. Based on UPR's non-use of the Ironton Branch in the past decade, Petitioner requests a declaratory order removing the STB's jurisdictional shield and enabling Petitioner to move forward with useful development of the property underlying the Ironton Branch.

Dated: August 22, 2016.

Respectfully Submitted,



Carl J. Belliston
Attorney for NewVistas Property Holdings, LLC
2365 Mountain Vista Lane, Provo, UT 84606
801-376-2210

I hereby certify that on this 22nd day of August, 2016, I caused a copy of this document to be served by e-mail and Federal Express to the following person:

Jeremy M. Berman
Union Pacific Railroad Company
1400 Dodge Street, Stop 1580
Omaha, NE 68179



(Signature) 8/22/16

(Date)

EXHIBIT A

BEFORE THE SURFACE TRANSPORTATION BOARD

WASHINGTON, D.C. 20423

STB Docket No. FD 36040

NEWVISTAS PROPERTY HOLDINGS, LLC

Declaration of Joseph R. Fox

I, Joseph R. Fox, declare that I am competent to testify of my own personal knowledge to the facts stated herein if called upon as a witness.

I was the petitioner in Joseph R. Fox—Petition for Declaratory Order, STB Docket No. FD-35161 (served May 18, 2009).

Between 2009 and the present date of this declaration, I have observed the Ironton Branch on nearly a daily basis. I have observed no traffic on the branch and no improvements have been made to the branch. The crossing light at 2000 South, Provo, Utah, near the north end of the branch has been removed and a substantial portion of the tracks between 2000 South and the south end of the branch have been removed. Various sections of track have been blocked by permanent chain link fences and some sections of track have been covered with asphalt by adjacent land owners. The track at the crossing of Ironton Blvd. has been removed.

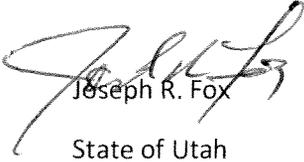
The remaining portions of the branch are in disrepair with separated tracks and deteriorating ties and ballast, and the branch is disconnected from the main line at its most northern end.

I have not heard of any actual or potential customers for the branch. The former mayor of Provo City, told me that while he was mayor, the city had decided not to pursue any further use for the branch, and the public records indicate that the city, under the direction of the current mayor, has since quitclaimed any interest in the branch to NewVistas Property Holdings, LLC.

Within the past five years I hired an environmental engineering firm to conduct environmental tests sampling surface and subsurface soil and subsurface water along the branch. The result of those tests indicated that there is contamination incident to the use of the branch related to the former steel mill and the railroads prior use of the branch.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: August 22, 2016.


Joseph R. Fox
State of Utah

County of Utah

SS:

Joseph R. Fox, being duly sworn, deposes and says that he has read the foregoing statement, knows the facts asserted there are true and that the same are true as stated.

Subscribed and sworn to before me this 22nd day of August, 2016.





Notary Public

EXHIBIT B

UTAH COUNTY DEED RECORD 252

Entry No. 4701 Filed June 19, 1926 at 9 A.M.

COLUMBIA STEEL CORPORATION, a corporation of the State of Delaware, Grantor, conveys and warrants to LOS ANGELES & SALT LAKE RAILROAD COMPANY, a corporation of the State of Utah, Grantee, for the sum of Ten (\$10.00) Dollars and other good and valuable considerations, a perpetual right of way and easement for all railroad purposes upon, over and across that portion of the East half of Section 20, Township 7 South, Range 3 East, S.L.B. & M., in the County of Utah, State of Utah, described as follows:

Commencing at the point of intersection of the Easterly line of right of way of the Los Angeles & Salt Lake Railroad with the North line of said Section 20, said point being South 89° 28' West 2818.99 feet, more or less, from the Northeast corner of said Section; thence along said right of way line South 24° 32' East 1348.8 feet and North 65° 28' East 61 feet to the true point of beginning; thence continuing along said right of way line South 24° 32' East 3040 feet; thence North 65° 28' East 30 feet; thence North 24° 32' West 3040 feet; thence South 65° 28' West 30 feet, to the point of beginning.

WITNESS the hand of said Grantor this 6th day of May, A. D. 1926.

ATTEST: A. C. Miller (CORP. SEAL) Its Asst. Secretary.

COLUMBIA STEEL CORPORATION, By L. F. Rains, Its Vice-President.

STATE OF UTAH) COUNTY OF SALT LAKE) SS

On the 6 day of May, A. D. 1926, personally appeared before me L. F. Rains, who being by me duly sworn, did say that he is the Vice-President of Columbia Steel Corporation, a corporation, and that said instrument was signed in behalf of said corporation by authority of a resolution of its Board of Directors, and said L. F. Rains acknowledged to me that said corporation executed the same. (SEAL)

My commission expires March 27, 1927.

L. M. Fernley Notary Public, Residing at Salt Lake City, Utah.

Examined and Approved APPROVED Charles Adams Right of Way and Tax Agent.

Division Engineer Superintendent H. C. Mann Ass't. Chief Engr.

General Manager Approved as to Form Geo. H. Smith General Attorney

Contract Attorney Approved as To Execution

General Solicitor.

INEZ JESSEE COUNTY RECORDER.

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Entry No. 4705 Filed June 19, 1926 at 10:55 A.M.

WARRANTY DEED

EMILY M. WARNER AND J. A. WARNER, her husband, Grantors of Provo City, in the County of Utah, State of Utah, hereby conveys and warrants to JAMES P. CLAYTON Grantee of Provo City, County of Utah, State of Utah for the sum of One Dollar and Other Valuable Considerations the following described tract of land in Provo City Utah County, State of Utah, to-wit:

Commencing at a point 2.50 chains North and 89° 40' East of the Northwest corner of the Southeast quarter of the Southwest quarter of Section 36, Township 6 South, Range 2 East of Salt Lake Meridian. Thence South 89° 40' East 11.32 chains; thence South 3/4° West 4.215 chains; thence North 89° 40' West 5 chains; thence South 3/4° West 5.375 chains; thence North 89° 40' West 6.32 chains; thence North 3/4° East 9.59 chains; to place of beginning. Area 8.16 acres.

UTAH COUNTY DEED RECORD 285

Entry No 1105 Filed Mar 5 1931 at 10:50 A.M.

WARRANTY DEED

GILBERT E. MITCHELL AND WIFE MABLE MITCHELL Grantor, of Lehi, County of Utah, State of Utah, hereby convey and warrant to FEDERAL LAND BANK OF BERKELEY, A Corporation Grantee of Berkeley, California for the sum of Ten and No/100 Dollars THE FOLLOWING described tract of land in Utah County, State of Utah:

1/2 of NE 1/4 of SE 1/4 of Sec. 36 Twp. 4 S. Range 1 West

WITNESS THE HANDS of said Grantor, this 15th day of October A.D. 1930.

Signed in the presence of

Gilbert E. Mitchell

Wm. M. Howell

Mable Mitchell

STATE OF UTAH)
COUNTY OF UTAH)

On the 15th day of October A.D. 1930 personally appeared before me Gilbert E. Mitchell and wife Mable Mitchell the signers of the within instrument, who duly acknowledged to me that they executed the same.

My Commission expires May 5th 1933 (NOTARY SEAL)

Wm. M. Howell Notary Public

Received Dec 5 1930
the Federal Land Bank
of Berkeley

My residence is Salt Lake City, Utah.

INEZ JESSEE COUNTY RECORDER

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Entry No 1107 Filed Mar 5 1931 at 12M.

ORIGINAL
WARRANTY DEED

COLUMBIA STEEL CORPORATION, A Corporation of the State of Delaware, Grantor, conveys and warrants to LOS ANGELES & SALT LAKE RAILROAD COMPANY, A Corporation of the State of Utah, Grantee for the sum of (\$10.00) Dollars and other good and valuable considerations, the following described tracts of land in Utah County, Utah;

A strip of land of varying width situate in the NE 1/4 of the NE 1/4 and the East 1/2 of Section 20, and the NE 1/4 of the NE 1/4 of Section 29, Township 7 South, Range 3 East, Salt Lake base & Meridian; being more particularly described as follows:

Beginning at a point on the North line of Section 20, 2827.2 feet West of the North east corner thereof, said section line having a bearing of S 89° 28' W thence continuing S. 89° 28' W. along the section line 25.7 feet; thence S 24° 22' E. 1362.8 feet; thence N. 65° 28' E. 15.0 feet; thence S 24° 22' E. 3040.0 feet; thence N 65° 28' E. 77.0 feet; thence N. 24° 22' W. 1040.0 feet; thence S 65° 28' W. 61.0 feet; thence N. 24° 22' W. 1348.8 feet to the North line of said Section 20; thence S 89° 28' W 8.2 feet along the North line of said Section 20 to the point of beginning.

Also a strip of land 31.0 feet wide being parallel with and uniformly 22.5 feet Southwesterly and parallel with and uniformly 7.5 feet northeasterly from the center line of the Los Angeles & Salt Lake Railroad's spur track as the same is now surveyed and located across the SE 1/4 of the SW 1/4 of Section 17 aforesaid Township and range, said center line of track being more particularly described as follows:

Beginning at the above described point of beginning. Thence N 24° 22' W. 278.2 feet to a point; thence along a curve concave to the Southwest having a radius of 1910.08 ft., for a distance of 487.22 feet to a point; thence N 39° 09' W. 252.6 feet to a point; thence along a curve concave to the southwest and having a radius of 784.49 feet for a distance of 24.9 feet, more or less to the southwesterly boundary of the Utah Railway Company right of way.

The above strips of land contain an area of 7.17 acres more or less.

The above described land is conveyed unto said Grantee for trackage purposes, and in the event that any portion thereof shall be abandoned for trackage purposes, such portion shall revert to the Grantor.

This deed is given to correct the description in that certain Warranty Deed dated the 23rd day of July 1923, wherein the Columbia Steel Corporation, a Corporation of the State of Delaware is Grantor, and Los Angeles & Salt Lake Railroad Company, a Corporation of the State of Utah, is Grantee, recorded in the records of the County Recorder of Utah County, Utah, October 18th, 1923, in Book 236 Page 362.

IN WITNESS WHEREOF the said Grantor has caused these presents to be executed by its duly authorized officers this 8th day of January 1931.

Attest: C.T. Redmond Secretary (CORP. SEAL)

COLUMBIA STEEL CORPORATION
By L. F. Rains Vice President

STATE OF CALIFORNIA)
City and County of San Francisco)

On the 8th day of January 1931, personally appeared before me L. F. Rains and C. T. Redmond who being by me duly sworn, did say that they are the Vice-President and Secretary respectively of Columbia Steel Corporation

and that said instrument was signed in behalf of said corporation by authority of a resolution of its Board of Directors; and said L. F. Rains and C. T. Redmond acknowledged to me that said corporation executed the same.

My Commission expires October 20, 1934 (NOTARY SEAL)
Approved as to form A.S. Halsted General Solicitor
Approved as to execution A.S. Halsted General Solicitor

Catherine E. Keith Notary Public
in and for the City and County of San Francisco, State of California

Approved: R. L. Adamson Chief Engineer
Approved: Charles Adams Right of way and tax agent

INEZ JESSEE COUNTY RECORDER

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