209107

BEFORE THE SURFACE TRANSPORTATION BOARD
OF THE UNITED STATES

CITY OF CREEDE, CO,	]	
Petitioner,	]	**FINANCE DOCKET NO. 34376**
	]	
DENVER & RIO GRANDE	]	**PETITION FOR**
RAILWAY HISTORICAL	]	**DECLARATORY ORDER**
FOUNDATION, INC.,	]	
Respondent	]	
	]	
UNION PACIFIC RAILROAD	]	**DOCKET NO. AB-33**
COMPANY - ABANDONMENT	]	**(SUB-NO. 132X)**
EXEMPTION - IN RIO GRANDE	]	
AND MINERAL COUNTIES, CO	]	

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CITY OF CREEDE'S SUBMISSION OF MATERIALS COMPILED DURING U.S. DISTRICT COURT PROCEEDINGS

——— § ———

The City of Creede, Colorado, by its attorney, George M. Allen, hereby makes this submission of materials compiled during U. S. District Court proceedings. This matter is before the Board on Petition For Declaratory Order, filed pursuant to the May 9, 2003 referral order under 28 U.S.C. §1336(b) made by the United States District Court for the District of Colorado.

A Table of Contents regarding the materials filed herewith is included following the narrative below.

Introduction

The City of Creede instituted suit in November, 2000, in the state district court for Mineral County, Colorado, seeking a declaratory judgment that Creede's residential zoning was applicable

to those parts of the former Denver & Rio Grande Western right of way lying within the town limits of the City of Creede and not used and not historically used for railroad purposes. The defendant Denver & Rio Grande Railway Historical Foundation (hereafter "the Foundation"), which acquired rights to operate the Creede Branch of the former D&RGW through an Offer of Financial Assistance in STB Case No. AB-33 (Sub-No. 132X), removed the state court zoning challenge to the U.S. District Court in Denver. Creede moved for remand, which was denied, resulting in the federal court proceeding which has led to this referral.

During the course of the federal litigation, Creede developed a factual record of documentary evidence not available at the time of award of OFA rights to the Foundation. For reasons we state below, that record establishes that the OFA rights were obtained by the Foundation on the basis of fraudulent representations to the Surface Transportation Board pertaining to the financial resources of the Foundation and of its founder, chief executive and financial guarantor, Donald H. Shank. The documentary evidence establishing the fraud perpetrated on the STB and the public by Mr. Shank and the Foundation is compiled in the documents submitted by this filing. This is evidence which was not available in 1999 and 2000, when the OFA rights issue was before the Board and constitutes newly discovered evidence within the meaning of the Board's regulations pertaining to revocation of OFA rights based on newly discovered evidence.

At no time in the more than three years since award of the OFA rights to the Foundation has it operated rail service on the Creede Branch. The documents submitted in this filing demonstrate beyond dispute that the Foundation acquired the Creede Branch in order to go into the real estate leasing business, and not for continued rail service, thus implicating 49 U.S.C. 10904(f) (specifying

that purchasers of rail lines under the OFA statute may not "transfer or discontinue service on such line[s] for 2 years); *Owensville Term Co. – Aband. Exemption — In Gibson and Posey Counties, IN OFA*, STB Docket AB-477 (Sub-No. 2X) (STB served Dec. 16, 1997).

The documentary record established in the District Court shows both fraud in the obtaining of the OFA rights and failure to operate rail service. Mr. Shank admitted in his June 21, 2001 deposition that the Creede Branch was out of service and that his alter-ego Foundation faced the task of rehabilitation of the line (Record, page 211). That the line has remained out of service and is now expected to remain out of service for the indefinite future (Mr. Shank recently gave a media statement claiming the Foundation might start service in 2005) represents – in the most fundamental way – a changed circumstance from that contemplated by the Board at the time of award of the OFA rights. Therefore, we have captioned this matter with both the Declaratory Order caption above and with the caption of the abandonment proceeding in which the OFA rights were awarded, based on Creede's position that the record of both fraud and materially changed circumstance require the Board to reopen the abandonment proceeding (Docket No. AB-33 (Sub-No. 132X)) and to revoke the OFA rights obtained by the Foundation.

Discussion

1. Newly Discovered Evidence Establishes That The Foundation Fraudulently Misrepresented Its Financial Capability To Purchase And Operate The Creede Branch.

The Board's records in Docket No. AB-33 (Sub-No. 132X) include submissions of unaudited financial statements from both the Foundation and from Mr. Shank (Record, pages 47-

52). The Foundation's Financial Statement includes Mr. Shank's personal guaranty of $400,000 toward the purchase price of the right of way (Record, page 50).

The October 3, 2003 affidavit of Creede Mayor Betty Jean Myers (Record, pages 1-10) details the process by which the City of Creede, utilizing discovery procedures of the Colorado federal court, was able to develop both sworn deposition testimony and documentary evidence that the Foundation never had the assets it represented to the Board when it acquired the Creede Branch. At paragraph 26 of her sworn October 3, 2003 affidavit, Mayor Myers stated:

> The federal court discovery process allowed us to develop the newly discovered evidence to establish that the core financial representations made to the STB by Mr. Shank and the Foundation regarding financial resources were fraudulent. As the materials from the federal court file show, Mr. Shank admitted in his depositions that the Foundation had not received most of the physical assets it claimed and had no enforceable agreements to require donation of those assets. To avoid further deposition testimony regarding his inability to perform on the guaranty he gave the Foundation, Mr. Shank stipulated on the record on September 24, 2001 that he was unable to provide the funds he pledged to the Foundation. Development through discovery of Mr. Shank's personal financial background further established that the California real property claimed by Mr. Shank on his personal financial statement to the STB (with a claimed value to the STB of nearly half a million dollars) was in fact property owned by Mr. Shank's former wife as to which Mr. Shank signed a sworn statement in the California divorce proceedings that he never had any interest in that property. In the California divorce decree it was confirmed as his former wife's separate property, owned by her prior to the marriage and as to which Mr. Shank never had any interest. Chief United States District Judge Lewis Babcock of the federal court in Denver received the Shank California divorce case materials into the federal court record over Mr. Shank's objection.

October 3, 2003 Affidavit of Creede Mayor Betty Jean Myers (Record, pages 6-7).

In opposing receipt of the Shank and Foundation financial materials into the federal court record, the Foundation's counsel took the position that Creede could not put such materials into the record because they went to issues which were foreclosed by Creede's failure to timely appeal the award of OFA rights to the Tenth Circuit Court of Appeals. The District Court received the materials into the District Court record over objection, based on Chief Judge Babcock's reasoning that the District Court was the venue in which to develop the factual record for use by the Board in this §1336(b) referral proceeding (Transcript of September 28, 2001 hearing before Chief U.S. District Judge Lewis Babcock, Record pages 313-341).

The material now submitted to the Board in this filing contains factual material which did not then exist and could not have been placed before the Court of Appeals, had there been a direct appeal to the Tenth Circuit immediately following the award of OFA rights. At that time the false financial statements of the Foundation and Mr. Shank were not controverted and Creede had no means of controverting them.

The August 3, 2001 deposition testimony of Mr. Shank (Record, pages 241-281) is replete with sworn admissions by Mr. Shank that the Foundation did not in fact have either possession or title to substantial assets claimed by the Foundation in its financial statements to the Board. In his August 3, 2001 deposition testimony, Mr. Shank conceded that most of the assets claimed by the Foundation were not in the Foundation's possession, had never been in its possession and that there were no enforceable agreements for donation of such purportedly valuable assets to the Foundation:

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3 Q **Who made those pledges? Who owns them now?**

A Well, the [railroad] cars technically are owned by the Catholic church. They're utilized by a youth camp as interim housing. Although they're not user friendly, they recognize that they have far more historic value to a railroad than they do to a youth camp. So it's a situation \ where they still are working to acquire the camp from the Catholic church. And once that is complete, they're donating the cars to the Foundation.

Q Who's "they"?

A Mountain Trails Youth Camp.

Q Okay. Where is it located?

A The office for the Mountain Trails is in Monte Vista.

Q Going down to "railroad memorabilia and artifacts."

A Yes.

Q Lantern collection.

A Uh-huh.

Q Is that actually owned by the Foundation?

A It is.

Q "Photographic and 8 millimeter movie collection." Is that owned by the Foundation?

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A Yes.

Q "Historic paper collection"?

A It is.

Q "Associated artifacts, switch stands, rail, spikes, car seals," etc. Is that owned by the Foundation?

A It is.

Q Would this $65,000 value be, on those aggregate items, memorabilia and artifacts, be a valid number running pretty much continuously from 1998 when this was done through '99 or 2000 when you acquired the OFA 11 rights?

A Yes. That would be a minimum value.

Q Would it be about the same value today?

A Certainly. Every bit of that.

Q Tell me; does the Foundation have things like this insured? Do you carry insurance on it?

A It's carried under insurance and in its present location by the donor, by donors. The Foundation, at this time, is not housing this collection on a Foundation site.

Q Are these in different donors' locales?
A They are.
Q So far as you know, **have the donors actually transferred these things to the Foundation in terms of legal title?**

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A They have. Although **there is not a document that supports this specifically,** it is understood.
Q So there would not be, for example, a business comprehensive insurance policy that the Foundation has that would have these items insured?
MR. MICKLEWRIGHT: Objection. Relevance. If you can, answer the question.
A Not currently. When we actually take possession of these items and place them in a Foundation facility, then the Foundation will insure the collection.
Q (By Mr. Allen) **There are no bills of sale or transfer documents on these items?**
A No.
MR. MICKLEWRIGHT: Objection to this line of questioning. Again, I think this goes to the OFA issues that I've already indicated your client has missed because they have failed to file an appeal timely to challenge the Offer of Financial Assistance. The documents speak for themselves. They're available as a public record and **I'm going to instruct my client not to answer.**
MR. ALLEN: What documents are available?
MR. MICKLEWRIGHT: Where did you receive these?
MR. ALLEN: Looks to me as though I got this from Ball Janik in Washington. That's the fax code at the

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top of my copy.
MR. MICKLEWRIGHT: Well, I don't know how you obtained it, but my assumption is -- if you obtained it, then my assumption is, unless it's subject to the confidentiality agreement, it's otherwise public record, and **I will instruct my client not to answer any questions regarding the Offer of Financial Assistance other than what's provided in the document here.**

Q (By Mr. Allen) Okay. Let's move to the "model railroad collection." I see three line items, "Lionel Train collection, American Flyer collection and SA3 N scale and miscellaneous" totaling $152,000. **Were those items, in November of '98, in the physical possession of the Foundation?**

A Not in the physical possession, but readily available.

Q Have they been transferred to the Foundation in terms of legal title to them?

A Verbalized, but not in a formal document.

Q Who is the donor or the holder of those items or holders, plural, if it's more than one?

A My father, my brother, and myself.

Q **Do you know whether any of those three individuals, your father, brother, yourself, have taken tax deductions for donations to the Foundation for these items?**

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A We have not.

Q **Do you know whether or not the donors of the railroad memorabilia and artifacts that are listed in the heading above have taken charitable deductions for donations of these items to the Foundation?**

MR. MICKLEWRIGHT: Objection to the form. If you can, answer the question.

A They have not.

(Record, pages 253 and 254) (Emphasis Added)

The above testimony establishes that while Mr. Shank and his Foundation represented to the Board in 1999 and 2000 that the Foundation had assets whose values were stated in six figures, consisting of memorabilia, model railroad sets and the like, as well as rail cars, the reality was that in August of 2001, nearly a year after commencement of litigation pending in the federal court, the Foundation did not have physical possession of the claimed assets, did not have documents for transfer of the claimed assets to the Foundation, was not insuring the assets and that none of the

supposed "donors" had taken tax deductions for donation of the assets. And with the exception of several out-of-service rail cars, appraised (without being seen by the appraiser) at values in the hundreds of dollars up to several thousand dollars), none of the assets were appraised or vouched for as to value by any person other than Mr. Shank himself.

2. Newly Discovered Evidence Establishes That Mr. Shank Never Had The Financial Ability To Make Good His $400,000.00 Personal Guaranty And That The Guaranty Was Fraudulent When Submitted To The Board.

The cornerstone of the Foundation's supposed ability to purchase the right of way from the Union Pacific was a personal guaranty by Donald Shank in the amount of $400,000.00

> Gentlemen, I, Donald H. Shank, do hereby pledge a donation to the D&RG Rwy Historical Foundation in the amount of FOUR HUNDRED THOUSAND DOLLARS, ($400,000.00) to be utilized for the acquisition of the Derrick-Creede right-of-way currently owned by the Union Pacific Railroad Company. The "Creede Branch" is listed with the Surface Transportation Board (STB) by Docket No. AB-33 (Sub-No. 132X) and includes 21.6 miles of right-of-way and track material.
>
> Respectfully submitted this 30th day of March, 1999 [signed] Donald H. Shank.

(Record, page 50).

Mr. Shank testified under oath on August 3, 2003 that he could not make good on the pledge:

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17 I have opened this to Appendix 2 of this document
18 which is a communication directed to the Board of Directors
19 of the Denver & Rio Grande Railway Historical Foundation
20 from Donald H. Shank. It reads as follows: "Gentlemen:
21 I, Donald H. Shank, do hereby pledge a donation to the D&RG
22 Railway Historical Foundation in the amount of $400,000 to
23 be utilized for the acquisition of the Derrick - Creed

right-of-way currently owned by the Union Pacific Railroad Company. The Creede Branch is listed with the Surface

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Transportation Board by Docket No. AB-33 (Sub-No." -- I think 13230, but I could be wrong about that number -- "and includes 21.6 miles of right-of-way and track material. Respectfully submitted this 30th day of March, 1999." Signed, Donald H. Shank.
Handing you that, do you recognize that as your signature?
A I do.
Q Have you, in fact, made that contribution to the Foundation?
A Not as yet.
Q Are you in a position to make that contribution between now and when the first of these payments comes due on September 1st of this year? And when I say "are you," are you right now today in a position to make this $400,000 contribution to the Foundation in order that it can make its September payment to Union Pacific?
A As of today, no.

(Transcript of August 3, 2001 Shank deposition; Record pages 241 and 242).

Mr. Shank repeatedly refused to answer questions as to why he could not make good his guaranty:

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MR. ALLEN: I'm answering your question.
Our position is that by raising the defense you have that this is a railroad and not subject to local zoning, that puts in play, if you will, the entire question of the viability and capability of actually -- who actually owned and operated this railroad.
Because if, for example, the answer I get to my questions cumulatively is, "We don't have any money; we can't possibly pay the Union Pacific Railroad; and we can't

possibly ever start hauling freight up and down the line," then that would mean that Creede zoning would be clearly applicable, and we wouldn't have the problem of having to deal with this assertion that it's a railroad that's exempt from zoning. But the pledge, which is a part of the operating rights that were obtained in this Offer of Financial Assistance, is based on the financial statement. So I want to find out what -- A, I want to test, by

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deposition examination, the financial statement as to what existed at the time it was made. I assume those answers are going to be that, "This is what was in my accounts or substantially in my accounts." I don't think that anyone is going to quibble over if it was 9200 or $9600 or 10,500 or 7,800, as long as it's in that range. I know most of us on a given day couldn't say exactly what is in our checking account.

And B, in a general way, I want to get a sense of what ability the Foundation has to meet its financial obligations. Because if the Foundation can't meet its financial obligations, then that is obviously germane to the issue of Creede zoning.

MR. MICKLEWRIGHT: Let me ask you, my understanding is that there was an order issued by the Surface Transportation Board on May 6, 1999. Are you aware of that?

MR. ALLEN: Probably. You have to refresh my recollection as to which order.

MR. MICKLEWRIGHT: It was decided in the manner of an Offer of Financial Assistance. Deals with this particular issue. My understanding was that the city was a part of that. Is that correct?

MR. ALLEN: I don't have any knowledge whatsoever. I was not involved in that.

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MR. MICKLEWRIGHT: I understand you may not

have been involved, but my understanding is that it's the final decision of the administrative board that it's subject to 28 USC 2344 and I'm going to **instruct my client not to answer. It appears to me what you're attempting to do is challenge the validity of -- the propriety of the board's decision approving the Offer of Financial Assistance.**

MR. ALLEN: We accept that is a done deal. I'm trying to find out whether or not these guys can ever haul freight up and down the line.

MR. MICKLEWRIGHT: What does Mr. Shank's financial condition have to do with that?

MR. ALLEN: They have, as yet, unperformed obligations which he just acknowledged. I mean, we've just gotten copies of Promissory Notes.

MR. MICKLEWRIGHT: What does that have to do with zoning? **I'm going to instruct him, at this point in time, not to answer any questions with respect to his financial condition.** That was based on information provided to the Surface Transportation Board from which your client could have taken an appeal and did not.

MR. ALLEN: You know, I don't know whether my client was a party to that procedure or not.

MR. MICKLEWRIGHT: They were, is my

understanding.

MR. ALLEN: But regardless of that –

MR. MICKLEWRIGHT: Well, they had a right.

MR. ALLEN: The issue in this case is not only this, but also the issues raised by your defense, and your defense is that this is not -- this is an operating railroad that's subject to STB jurisdiction.

MR. MICKLEWRIGHT: This appears to be a belated attempt at an appeal that was barred after 60 days by the 28 USC 2344. If you want to call the magistrate, my understanding is he's in this morning, but **I'm going to instruct my client not to answer any questions unless otherwise ordered by the magistrate.** And I'll file for a Protective Order with respect to those questions.

MR. ALLEN: Let me get all the questions out so we have a fully formed record. And you can take the position you're taking, and I can't stop you from doing that, but I believe that this is the heart of the litigation.
MR. MICKLEWRIGHT: I understand that's your belief.
Q (By Mr. Allen) Okay. Under cash and cash equivalents in the Statement of Financial Condition, Mr. Shank, we see a total figure of $18,700. First, is that a substantially accurate figure as to the time when this

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financial statement was given, which is dated March 15, 1999?
A Yes, I believe that's correct.
Q Second question, do you presently have available cash and cash equivalents in a range of, and let's say within that number, plus or minus ten percent, in the amount of $18,700?
MR. MICKLEWRIGHT: I'll instruct the witness not to answer the question.
Q (By Mr. Allen) Under "Notes and Loans Receivable" of the Statement of Financial Condition, it lists a second trust deed receivable of $145,000. Was that a substantially accurate statement as of the time it was made in March of 1999?
A It was.
Q Can you tell us who was the obligor on that trustee?
A It's confidential.
Q Well, it's subject to a confidentiality agreement, but I still want the answer.
A My brother-in-law.
MR. MICKLEWRIGHT: Yeah, it's subject to confidentiality.
Q (By Mr. Allen) Has that been paid to you, or is it still owed to him by you?

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MR. MICKLEWRIGHT: I'll instruct the witness not to answer.

Q (By Mr. Allen) I'm not going to bother with other loans receivable for $5400. I don't believe that is a material amount one way or the other. Under investments, there is a line item titled, "Investment with Jeffrey Matz," —A-T-Z, "Esquire, Phoenix, Arizona." Principal amount of $100,000 and profits earned as of 3-20-99, available 4-1-99 of $87,500. So the two taken together would be $187,500. Was that a substantially accurate statement at the time it was made?

A At the time it was made.

Q Do you presently have an asset of that kind or character having approximately that value with Mr. Matz?

MR. MICKLEWRIGHT: I'll instruct the witness not to answer the question.

Q (By Mr. Allen) The next line item is "Stock in privately held corporations." There are three line items. Two are for 5,000 each. I won't bother with them. The third is Borrasca Land and Development, 50 percent owner. First, did I correctly pronounce that?

A Borrasca.

Q Could you spell it for the reporter so we have a clean record.

A B-O-R-R-A-S-C-A.

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Q Borrasca Land and Development, 50 percent owner, and it's shown as a line item of $125,000. Was that a substantially accurate figure at the time that representation was made?

A It was.

Q And do you presently have a 50 percent ownership in Borrasca Land and Development?

MR. MICKLEWRIGHT: I would instruct the witness not to answer the question. Let me restate the basis for the objection. My understanding is that this

question has nothing to do with zoning, that it is a belated attempt at an attack on the Offer of Financial Assistance and that to do so would be a violation of 28 USC 2344.

Q (By Mr. Allen) The next line is -- I'm going to back up. Regardless of whether you have any interest in it or not, does Borrasca Land and Development still exist as an entity?

A No.

Q Next line item shows "The Mortgage Station, LLC, 50 percent, and then in parens, (with wife), close parens, $40,000. Was that a substantially accurate representation at the time it was made?

A Yes.

Q Now, as I understand it, at the time of this

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financial statement in March of 1999, you were married?

A Correct.

Q And you are no longer married?

A That's correct.

Q Are you still involved in a business called The Mortgage Station, LLC?

A No, I am not.

Q The next line item is "Air Park Village, LLC," 50 percent ownership. Excuse me. Shows a line item of $250,000. Was that a substantially accurate representation at the time it was made?

A It was.

Q And you own -- when this says 250,000, does that mean that the total of Air Park Village, LLC, was 250 and your 50 percent was 125, or does that mean the total was 500 and your equitable interest is 250?

A The figure represented here is representative of my 50 percent.

Q So then presumably the total then for the entire worth of Air Park Village, LLC, would be about $500,000?

A Yes.

Q These are all even numbers. I assume there

was not an attempt to state these all out to the last decimal and that these are approximations. Is that fair to

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say?
A That is correct.
Q Is Air Park Village, LLC, still in existence?
A It is.
Q Are you still a 50 percent owner?
A I am.
Q Will you tell us whether or not 250,000 is a fair figure for your approximate ownership today?
MR. MICKLEWRIGHT: I'll object and instruct the witness not to answer the question.
Q (By Mr. Allen) With regard to the final line item here under "Land and Business, 22.66 acres, Highway 160 East," 100 percent owner. I assume that's Highway 160, US Highway 160 in La Plata County, Colorado?
A That's correct.
Q Is that figure, 450,000, a substantially accurate figure as of the time this representation was made?
A It was.
Q And are you still the owner of that property?
MR. MICKLEWRIGHT: I'll instruct the witness not to answer the question.
Q (By Mr. Allen) Well, is there still

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property at that location having roughly that configuration, 22.66 acres?
A There is.
Q Where is that located on Highway 160?
A That property is located -- if you're familiar with Farmington Hill?
Q I am.
A That's the intersection between 550 and 160. It is approximately half a mile east on the north side of

Highway 160.
Q Other assets there is shown a figure of $495,000 for personal residence in Agoura, California, held jointly. It says "held jointly." I assume that was held with your former wife?
A Correct.
Q Was that a substantially accurate figure at the time it was made?
A It was.
Q Do you still have any ownership interest in that property?
A No, I do not.
Q Was your ownership interest -- where this says "personal residence, jointly," is 495,000 the net equity held by both you and your wife at that time?
A Correct.

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Q Did your divorce take place in California?
A Yes.
Q And this was, therefore, a California community property, if you know?
MR. MICKLEWRIGHT: Objection. Calls for a legal conclusion.
MR. ALLEN: He can still answer if he knows.
MR. MICKLEWRIGHT: I know. If you know.
A I do not.
Q (By Mr. Allen) **In the course of becoming divorced, did you receive any part of that property or payment in return for your share of that property?**
MR. MICKLEWRIGHT: I'll object and instruct the witness not to answer the question.

(Record, pages 243 to 245)

The above transcript excerpts amount to nothing less than stonewalling on the question of whether Mr. Shank could make good his $400,000 guaranty against the Foundation's purchase obligation to the Union Pacific, which was, on the date of that deposition (August 3, 2001), over

$270,000.00 in arrears and, based on the record of the federal litigation, remains unpaid.

Most telling, however, as to the fraud perpetrated on the Board by Mr. Shank and the Foundation, is the public record of Mr. Shank's California divorce. We obtained a copy of the actual divorce decree and judgment in that proceeding and that document was received in evidence by the federal court in Denver, over Mr. Shank's counsel's strenuous objection. That document is in the Record filed herewith (Record, page 352-386). In the California divorce judgment, signed by Mr. Shank under oath on October 28, 2000 (approximately one week prior to the filing by Creede of the state court zoning enforcement case), at page 361 of the Record (a page initialed by Mr. Shank), Mr. Shank became bound to the following language:

> [t]he residence at 6214 Watertree Court, Agoura Hills, CA 91301 "Is the separate property of the Petitioner [Gayle Shank] purchased by Petitioner in her own name prior to marriage. **The parties' acknowledge and warrant that at no time was title ever transferred to the parties jointly or as community property. The parties acknowledge that in connection with Petitioner's earlier refinancing of said residence Respondent [Donald Shank] executed a Quit Claim Deed in favor of Petitioner and that said Quit Claim Deed remains in full force and effect. . .**" (Emphasis added)

(Record, page 361)

The Agoura Hills house was the largest single line item in Mr. Shank's personal financial statement, submitted to the Board on April 2, 1999 (Record page 50). His characterization to the Board that he held an interest in that property was a false and fraudulent representation at the time he made the representation. The California divorce judgment recites, on a page initialed by Mr. Shank, that he and his former wife entered into a Marital Separation Agreement on June 1, 1999,

less than two months after he told the Board that he owned the Agoura Hills property.

The California divorce judgment recites that the half million dollar house Mr. Shank claimed to the STB to be his largest single asset, with a value of $500,000, was his wife's pre-marital property, that Mr. Shank quit-claimed any interest in the property during the marriage as part of a re-financing, and less than two months after representing to the Board that he owned the property as a half million dollar asset in his own name, he entered into a Separation Agreement with his former wife by which he agreed that he had ***never*** had any interest in the Agoura Hills property.

Mr. Shank characterized himself to the Board and to the public at large as a successful and sophisticated businessman, capable of purchasing, rehabilitating and operating a 21 mile stretch of abandoned dilapidated rail line and able to make it a freight carrier notwithstanding the closure decades earlier of its only consequential shipper, the mine operation at Creede. He could not possibly have regarded a claim to ownership of a half million dollars worth of California real property (in which he had never had any interest and did not have any interest when he represented it as an asset to the Board) as a mere oversight or clerical error.

It is impossible to reconcile Mr. Shank's divorce judgment, confirming non-ownership of the California property as of June 1, 1999 with the bald statement in the April 2, 1999 OFA submission, signed by Mr. Shank's Chicago attorney, Mr. McFarland, "Mr. Shank currently has sufficient liquid assets to make good on his pledge to the Foundation. There is current equity of $433,000 in Mr. Shank's residence, which is available for equity financing." (Record page 45).

The fact that Mr. Shank affirmatively mislead the Board regarding the California real property raises a presumption against the veracity of the claimed values of the numerous other

properties as to Mr. Shank refused to testify on the 13 separate occasions when his counsel directed that he not respond. We do not fault Mr. Shank's Denver attorney, Raymond Micklewright, who is a well-regarded Denver lawyer specializing in defense of white collar criminal litigation. Mr. Micklewright was keeping his client out of trouble by avoiding potential violation of the federal perjury statute.

But in civil litigation it is hornbook law that refusal to answer a question raises an inference that the answer, if given, would be against the interest of the witness. Thus the inference to be drawn by both the federal court in Denver and this Board is that if Mr. Shank had testified regarding the other assets on his March 15, 1999 financial statement, his testimony would have been that those assets had no value. Since Mr. Shank has described no event between the April 2, 1999 submission of his Financial Statement to the Board and his August 3, 2001 deposition testimony by which he lost his claimed fortune, the legitimate inference – indeed the irresistible conclusion – is that he did not have the other assets in April, 1999 any more than he had the California real estate.

When we sought to compel Mr. Shank's testimony regarding his other assets by way of a Motion to Compel his response, his means of avoidance of giving that testimony was to stipulate that he could not make good the $400,000 guaranty (Record, page 307).

3. The Foundation's Representations Regarding Cost And Capability To Restore The Creede Branch Were False and Fraudulent.

Mr. Shank and the Foundation represented to the Board that the Foundation could, after award of OFA rights, complete a $600,000 purchase from the Union Pacific and then meet the cost of rehabilitating the dilapidated line and restoring freight service which had not operated since the

mid-1980's. That the Creede Branch was in terrible condition when service stopped in 1985 is not open to dispute, and ultimately, is not even disputed by the Foundation and Mr. Shank, although their characterizations to the Board in seeking OFA rights were sanguine to the point of material misrepresentation. In *The Rio Grande's LaVeta Pass Route*, Evergreen Press, copyright 2000 by Stephen Rasmussen, the author, a noted Western rail historian, quoted D&RGW train crews who described the uncomfortable sensation of tracks moving beneath slow-moving trains in the latter years of service (1980 and later years through cessation of service in 1985) on the Creede Branch. At that time the line had a 15 mph speed limit. Thereafter the tracks fell into further disrepair after the Rio Grande ceased operation.

Union Pacific's detail regarding the six bridges on the route, all over 100 years old, and five of wood construction, further exacerbates the challenge of restoration of service (Record, page 40).

The reality, which we now know to have been known at all times to Mr. Shank and the Foundation, is that the cost of restoration of freight service on the Creede Branch was projected at all times at over **$10 million**, an amount 14 times greater than the $700,000 figure represented to this Board and in the Shank submissions in the federal litigation. At pages 404 to 412 of the Record, we reproduce the documents obtained by an Open Records request to the Colorado Department of Transportation and received by Judge Robert Blackburn[1] of the U.S. District Court in Denver over the Foundation's objection.

Mr. Shank applied to CDOT for grants totaling **$11,295,000.00** to carry out his scheme to

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[1] Chief Judge Lewis Babcock of the U.S. District Court in Denver transferred the Denver federal court proceeding to Judge Robert Blackburn in 2002.

institute a tourist passenger service on the Creede Branch. We detail the CDOT submissions:

June 14, 2002 **Donald Shank to CDOT Transmittal Letter** forwarding applications for CDOT Enhancement funds and referencing Denver & Rio Grande Railway Historical Foundation "Master Plan" in two separate places in the letter; (Record, page 404)

June 14, 2002 **$8,094,240.00** Project Cost Funding Application (for which $6,475,392.00 is sought from CDOT) for the following purpose: "Restore the Track and Ties Between South Fork and Creede, Colorado." (Record, Page 405)

June 14, 2002 **$2,075,500.00** Project Cost Funding Application (for which $1,660,400 is sought from CDOT) for the following purpose: "Restore the Bridges between South Fork and Creede on the D& RG line." (Record, page 406)

June 14, 2002 **$125,650.00** Project Cost Funding Application (for which $100,420.00 is sought from CDOT) for the following purpose: "Construct a Railroad Maintenance Facility." (Record, Page 407)

June 14, 2000 **$1,000,000** Project Cost Funding Application (for which $800,000.00 is sought from CDOT) for the following

purpose: "Acquire Right-of-Way between South Fork and Monte Vista, Colorado." (Record, Page 408)

June 14, 2002 **Attachment A - Project Description** Attachment to the above funding applications, stating in the first sentence, "In March 1999 the Denver & Rio Grande Railway Historical Foundation competed development of its Master Plan for the rehabilitation of the historic railroad between South Fork and Creede. . . The Plan itself is extensive and provides a vision for the railway for many years to come." The attachment contains four separate references to the "Master Plan" and one reference to "the Plan." (Record, Page 409)

September 24, 2002 **Email from Donald Shank to Laurie Blanz**. Email from Mr. Shank withdrawing Foundation application for funds from CDOT and stating that Foundation does not have funds to post a letter of credit for project as required by CDOT; (Record, Page 410)

August 23, 2002 **Letter from CDOT Executive Director Tom Norton** in which Mr. Norton rejects threat of highway closures if funding is not granted; (Record, Page 412)

The above figures doubtless come much closer to the mark for reality as to the cost of rehabilitation of the Creede Branch. They are completely incompatible with the representations to

this Board and in the early stages of the federal litigation that the project could be done for $700,000.00 (Record, page 237). Since they reference a "Master Plan," they make it blindingly obvious that Mr. Shank and the Foundation knew all along that the real horizon for rehabilitation of the Creede Branch was a multiple at least **14 times greater** than the $700,000 figure they submitted to the Board.

The above grant application dollar amounts – and the Foundation's utter inability to meet them – must also be viewed against the context of Mr. Shank's sworn testimony in his first deposition, on June 21, 2001, that he and his Foundation did not have a clue as to who might actually ship freight on the Creede branch (Record, page 236: "We're not at that point yet.") A few minutes earlier in the same proceeding, Mr. Shank had admitted quite candidly that a tourist train was his objective, not carriage of freight: "We're clearly looking at a tourist train on this line" (Record, page 236, June 21, 2001 deposition transcript, page 103, line 4).

And, as Mayor Myers' affidavit points out, in public meetings to discuss his proposed take-over of the line, Mr. Shank never discussed year-round freight operation and its implications of snow removal. His only discussion was of carriage of tourists in summer months.

4. The Real Agenda Was Leasing Real Estate

The plats of Creede following page 416 of the Record show a significant number of commercial establishments which lie on the right of way in Section 25. These have been identified to the undersigned by Mayor Myers, who is intimately familiar with her town, as the following:

Creede Trading Post
Gift Shop
Broken Arrow Realty Co.

Max' Old Mine
The Bunk House Home Decor Store
Former Art Gallery
Art Park
Journey's a Restaurant
First National Bank of Lake City and Creede
Holy Moses Gift Store
Old Firehouse Bed and Breakfast
Tomkin's Hardware
Amethyst Emporium
Masonic Lodge Upstairs
Abbey Lane Gallery
In addition, about six houses project into the right of way on Section 25.

Shortly after receipt of the award of OFA rights, Mr. Shank and the Foundation issued demand letters to individuals and businesses that they either make lease payments to the Foundation or vacate (Record, pages 69 to 86). The Foundation established a website and declared its intention to operate a rail station in Creede, notwithstanding the fact the Denver & Rio Grande Western Railway had sold the historic railroad depot to Mineral County and the further fact the County leases the depot to the Creede Historical Society.

The Foundation's lease demand letters and website (Record, pages 87-100) made clear the goal of imposing a real estate leasing regime on Creede's commercial district in Section 25. Since the businesses and residences had been undisturbed for over a century, the consternation caused by the Foundation seeking tens of thousands of dollars per year in lease revenues was profound, as Judge Babcock recognized in his order denying remand (Record, pages 175-181).

Creede's Mayor Myers described the disruptive impact of the Foundation's leasing regime in her February 21, 2001 affidavit:

> One Creede citizen, Louise Gray, was told she must lease the land on

> which her garage is situated, and was told she must pay Mr. Shank and his Foundation $300.00 per year for land she has owned and occupied for many years. I know Louise Gray. She is elderly and retired from her job at the hardware store and lives on her social security and modest personal supplemental income from activities such as picking up aluminum cans and reselling them. For Mr. Shank to try to force her to pay him $300 per year as lease rent for land he and his Foundation do not own and probably never will own, with the threat he will close access to Louise Gray's garage and preclude use of her car, purchased with funds from her scavenging, is cruel and extortionate beyond any comprehension. . . . How in the world will Louise Gray ever be able to buy $1 million insurance coverage for Shank's Foundation? And if she does not come up with the insurance, will she lose access to her house, her garage and her car even after she pays Mr. Shank his extortionate rent? . . . It is my understanding that similar extortionate demands have been made on numerous other Creede landowners.

(February 21, 2001 Affidavit of B.J. Myers, Record page 104).

Notwithstanding vigorous efforts by the Foundation's able Denver attorneys to prevent evidence being developed regarding the disruptive impact of the Foundation on the lives and ordinary commerce of Creede, the District Court received into its records detailed documentation of the disruptions perpetrated on Creede by the Foundation.

The Foundation's leasing demand letters to Louise Gray and Mr. and Mrs. Dale Pizel are in the Record at pages 69 to 86. The extortionate lease which the Foundation ultimately imposed on Louise Gray is in the Record beginning at page 70. The demand that Mrs. Gray, an elderly social security pensioner, provide Mr. Shank and his Foundation with complex insurance coverages of as much as a $1 million, as well as with workers compensation coverage and umbrella coverages (and be subject to loss of her use of her property should she default on the insurance clauses) cannot be seen as anything other than extortion. That Mrs. Gray ultimately signed the lease and made lease

payments to Mr. Shank and his Foundation is a sad testament to the potential for predation arising from allowing OFA rights to be twisted into vehicles for Dickensian oppression of the poor by a person allowed by the government to claim to be operating as a railroad.

Conclusion

This litigation was filed to establish that Creede's residential zoning is applicable to non-rail uses of the historic D&RGW right of way within the City of Creede. At no time has the City sought to impose its zoning on rail-related activity. Creede recognizes that the issue of local police power application on rail rights of way is complex and raises sensitive rail regulatory and pre-emption issues. But Creede does not seek to project its zoning onto rail or rail-related activities.

In the course of the litigation, Creede made a federal court record which is beyond dispute that neither Donald Shank nor the Foundation had an intent to operate freight rail service over the Creede Branch. Rather, they intended to use the OFA rights to extract lease rentals and to engage in a fund-raising operation based on rail nostalgia. They never had even the remotest capability to actually rehabilitate and operate any kind of rail service and the three years since their receipt of OFA rights makes that point clear beyond dispute. The amounts they have claimed to spend in defense of litigation (on an order of $20,000.00) are trivial measured against the multimillion dollar real cost of rail operations.

The litigation in the federal court in Denver and this referral proceeding resulting from that litigation are not the cause of the failure of Mr. Shank and the Foundation with respect to the Creede Branch. The Foundation and Mr. Shank have failed on the Creede Branch due to Mr. Shank's own financial inadequacies and shortcomings and his fraudulent representations to this Board and to the

public at large that Mr. Shank and his alter-ego Foundation somehow had the ability to initiate rail service on the Creede Branch of the former D&RGW railroad.

The evidence compiled in the District Court compels the conclusion that OFA rights were obtained here not to operate freight rail service, but for other and non-good faith reasons and that the Board should take the action implied by paragraph 7 of Judge Blackburn's referral order to reopen the abandonment proceeding and revoke the Foundation's OFA rights as having been fraudulently obtained.

Respectfully submitted,

GEORGE M. ALLEN
Counsel for City of Creede

CERTIFICATE OF SERVICE

I hereby certify that I have, at Provo, Utah, this 10th day of October, 2003, served a true copy of the documents denominated below on the parties and/or counsel listed below by the means of service shown below:

Documents Served

CITY OF CREEDE'S SUBMISSION OF MATERIALS COMPILED DURING U.S. DISTRICT COURT PROCEEDINGS

Means of Service

(x) U.S. Mail, Postage Prepaid
( ) Overnight Courier
( ) Hand Delivery

Agencies, Persons and/or Counsel Served

Hon. Vernon Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Suite 700
Washington DC 20423-0001

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Mayor
City of Creede
P.O. Box 457
Creede CO 81130
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cityofcreede@amigo.net

Sheila W. Valgardson

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BEFORE THE SURFACE TRANSPORTATION BOARD

CITY OF CREEDE, CO,	]	
Petitioner,	]	**FINANCE DOCKET NO. 34376**
	]	
DENVER & RIO GRANDE	]	**PETITION FOR**
RAILWAY HISTORICAL	]	**DECLARATORY ORDER**
FOUNDATION, INC.,	]	
Respondent	]	
UNION PACIFIC RAILROAD	]	**DOCKET NO. AB-33**
COMPANY - ABANDONMENT	]	**(SUB-NO. 132X)**
EXEMPTION - IN RIO GRANDE	]	
AND MINERAL COUNTIES, CO	]	

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COMPILED DURING U.S. DISTRICT COURT PROCEEDINGS

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BEFORE THE SURFACE TRANSPORTATION BOARD

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Petitioner,	]	**FINANCE DOCKET NO. 34376**
	]	
DENVER & RIO GRANDE	]	**PETITION FOR**
RAILWAY HISTORICAL	]	**DECLARATORY ORDER**
FOUNDATION, INC.,	]	
Respondent	]	
UNION PACIFIC RAILROAD	]	**DOCKET NO. AB-33**
COMPANY - ABANDONMENT	]	**(SUB-NO. 132X)**
EXEMPTION - IN RIO GRANDE	]	
AND MINERAL COUNTIES, CO	]	

AFFIDAVIT OF MAYOR BETTY JEAN MYERS
ON BEHALF OF THE CITY OF CREEDE

STATE OF COLORADO)
)
COUNTY OF MINERAL)

Betty Jean Myers, being duly sworn, states:

1. I am the Mayor of the City of Creede, Colorado, the Petitioner in the above-captioned Declaratory Order proceeding.

2. The statements set forth below are based on my own knowledge and observation.

3. With the exception of four years, I have resided in Creede since 1973. I have been employed in Creede since that time, initially as a theatre manager and since 1988 as the manager of a retail store known as Amethyst Emporium.

4. Creede is a town with a permanent population of only 377.

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5. The official 2000 census population of Mineral County, Colorado, of which Creede is the county seat, was 831, and was estimated by the United States Census Bureau to have decreased by 2.6 percent to about 810 persons as of mid-2001.

6. The rail line involved in this proceeding lies almost entirely within Mineral County. Only the easternmost one or two miles of the line is located in Rio Grande County.

7. As a long-time Creede business operator, I am intimately familiar with the business community of Creede and Mineral County. I am personally acquainted with the owners and/or operators of all of the businesses in Creede and Mineral County. I am past president of the Creede/Mineral County Chamber of Commerce.

8. Attached as Exhibit A to this Affidavit is a list of all businesses in Creede and along the rail line between Creede and South Fork within Mineral County. This listing of some 74 entities, which includes churches and government operations, is consistent with the Census Bureau's enumeration of 52 non-farm private business operations in Mineral County in 1999.

9. Creede's economy is based almost entirely on seasonal tourism during the summer tourist season and autumn hunting season.

10. Creede has no medium or heavy industry.

11. Creede has had not freight rail service since 1972.

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12. No business or resident in Creede has any need for freight rail service.

13. All freight moving into and out of Creede travels by motor carrier, usually by United Parcel Service, Federal Express or the U.S. Postal Service.

14. To the extent that Creede has any shipping needs, those needs are for light package shipping or for regular resupply of the grocery store, the restaurants, the hotels and the small retail shops which support tourist and local residential trade.

15. The only business I can think of which could even remotely be able to utilize shipping other than by package service (such as UPS) or motor carrier, is the hardware store. It is a True Value hardware store.

16. I have queried the hardware store management and been informed by them that their shipping needs are met completely by motor carrier service owned by True Value Hardware and that they have no need of shipping by rail and would not use rail shipping if it were available.

17. While I am not as intimately acquainted with the business community of the town of South Fork, which lies at the eastern end of the Creede Branch right of way, I am completely confident that my conclusions regarding lack of market for freight rail shipping are just as applicable to South Fork's small cohort of motels, service stations and restaurants as they are to Creede. Those are the only businesses surviving in South Fork since the closure of the saw mill several years ago. The reality is that very small businesses in small mountain towns whose economies are based on tourism (as is the case with both Creede and South Fork) simply do

not have any need or requirement for freight rail shipping.

18. I attended the depositions of the President of the Denver & Rio Grande Railway Historical Foundation, Donald Shank. Those depositions were taken in the federal court proceeding filed by our town in state court and removed by Mr. Shank's lawyers to the U.S. District Court in Denver.

19. In his depositions Mr. Shank was asked directly whether he or his Foundation had identified any potential interstate freight rail shippers. His answer was that neither he nor his Foundation knew of any potential freight rail shippers for rail transport of freight into or out of Creede.

20. While Mr. Shank's depositions were taken several years ago, there has been no change in the economy or circumstances of Creede, Mineral County or the upper Rio Grande River Valley since those depositions were taken. If anything, because of the adverse effect of the September 11, 2001 terrorist attack on the travel and tourism industries (on which Creede's economy is based), our business activity level is less now than it was when the Offer of Financial Assistance rights were awarded to Mr. Shank and his Foundation. Therefore, the potential for interstate freight rail shipment, which was non-existent in 2001 when Mr. Shank's deposition testimony was obtained, is even more remote today than it was in 2001.

21. I attended meetings concerning the Foundation's proposed tourist train in both Creede and the town of South Fork, which lies at the eastern end of the right of

way at issue in this proceeding. Donald Shank, the President of the Denver & Rio Grande Railway Historical Foundation, was the speaker at all of those meetings. In those meetings there was never any mention of about freight rail service. In those meetings Mr. Shank stated repeatedly that it was the intention of his Foundation to start up a tourist passenger train to operate only in the summer tourist season.

22. Year round operation of a rail service on the Creede Branch would be enormously more expensive and difficult than summer operation. Creede's elevation is over 8,800 feet above sea level and the entire upper Rio Grande valley is at high elevation and is characterized by heavy winter snow fall. Year round freight operation would require expensive snow removal equipment.

23. I have followed the proceedings throughout the entire time in which the Foundation sought and obtained OFA rights to the Creede Branch and I have been, as Creede's mayor and chief executive officer, a participant in the entire litigation process relating to the OFA rights. In the course of the litigation we were able to use the discovery procedures of the federal court to obtain hard evidence of the outright misrepresentations and fraud involved in Mr. Shank's and the Foundation's past representations to the Surface Transportation Board and to the Creede and Mineral County communities.

24. Absent the federal court discovery proceedings, all of which were vehemently opposed by Mr. Shank and the Foundation, we would not have been able to

develop evidence regarding Mr. Shank's true financial circumstances or his very substantial factual misrepresentations.

25. The reality developed in the federal court records we are filing with this Board is that the true cost of resumption of freight rail service on the Creede Branch would run into tens of millions of dollars, as Mr. Shank represented to the Colorado Department of Transportation, and that Mr. Shank and the Foundation never at any time in the several years after award of OFA rights had more than a fraction of the money for the purchase price from the Union Pacific, much less the financial resources to complete the purchase payment and rehabilitate the line, which was in terrible condition when operations on it ceased almost two decades ago.

26. The federal court discovery process allowed us to develop the newly discovered evidence to establish that the core financial representations made to the STB by Mr. Shank and the Foundation regarding financial resources were fraudulent. As the materials from the federal court file show, Mr. Shank admitted in his depositions that the Foundation had not received most of the physical assets it claimed and had no enforceable agreements to require donation of those assets. To avoid further deposition testimony regarding his inability to perform on the guaranty he gave the Foundation, Mr. Shank stipulated on the record on September 24, 2001 that he was unable to provide the funds he pledged to the Foundation. Development through discovery of Mr. Shank's personal financial

background further established that the California real property claimed by Mr. Shank on his personal financial statement to the STB (with a claimed value to the STB of nearly half a million dollars) was in fact property owned by Mr. Shank's former wife as to which Mr. Shank signed a sworn statement in the California divorce proceedings that he never had any interest in that property. In the California divorce decree it was confirmed as his former wife's separate property, owned by her prior to the marriage and as to which Mr. Shank never had any interest. Chief United States District Judge Lewis Babcock of the federal court in Denver received the Shank California divorce case materials into the federal court record over Mr. Shank's objection.

I have read the above affidavit and the statements therein are true to the best of my knowledge.

Betty Jean Myers

Subscribed and sworn to before me this 3rd day of October, 2003.

Notary Public

My commission expires: 6/6/2007.

PAMELA J WILSON
Notary Public
State of Colorado

EXHIBIT A

THE FOLLOWING IS A LIST OF BUSINESS WITHIN THE CITY OF CREEDE AND ALONG THE RIGHT-OF-WAY WITHIN MINERAL COUNTY

*Adjacent to r-o-w within Creede
**Adjacent to r-o-w within Mineral County

NORTH TO SOUTH – MAIN STREET – WEST SIDE
*Mineral County Courthouse
*Masonic Lodge/Abbey Lane Gallery
*Amethyst Emporium (gift, clothing & book shop)
*Amethyst Inn
*Tomkin's Tru-Value Hardware (All freight delivered by Tru-Value trucks)
*Holy Moses (gift shop)
*Old Fire House Bed & Breakfast/Ice Cream Parlor
*First National Bank – Creede Branch
*Journeys (restaurant)
*City Art Park
*Vacant – for sale
*The Bunkhouse (home décor)
*Mom's Old Mine (restaurant)
*Broken Arrow Land Company (real estate broker)
*Gift Shop
*Creede Trading Post (gift shop)
*Rio Grande Angler (fishing gear store)
*City Park
*Creede Historical Society Museum
*Creede Historical Society Library
*Kentucky Belle Market (grocery store – all freight delivered by truck)
*Beaver Liquor
*The Bunkhouse (clothing and gifts)
*Ice Cream Parlor
*Willow Creek Realty
Indigo Body Works (massage therapy)
Rincon Realty

NORTH TO SOUTH – LOMA
*Bed & Breakfast
*Shadownese (art gallery)

*Sheppard Wood Works
*Self-Storage
*Health Clinic
*Loma & HWY 149 – property for sale

NORTH TO SOUTH – MAIN STREET – EAST SIDE
Main & 2nd Street – property for sale
Creede Repertory Theatre.
Ramble House (fishing gear store)
Community Banks – Creede Branch
Café Ole (restaurant)
Creede T-shirt Shop
Elk Country (t-shirts & gifts)
Tommyknockers (bar & restaurant)
US Post Office
CenturyTel (telephone building)
San Juan Sports
Rare Things (Gallery)
Rare Things (rocks and antiques)
Wild Thistle (home décor)
Creede Country Club (gift shop)
Healing Hands (massage therapy)
Best Little Dog House in Creede (hot dog stand)
Rose of Creede (florist)
Chiropractor
Bead Shop
Forest Service
Creede Community Church
Blessings Inn (bed & breakfast)
Jane's Beauty Quest (beauty shop)
Slim Smoothie Shop
Laundromat
Self-Storage
Episcopal Church
Mountain Man Tours (rafting)
Country Store (gifts)

HIGHWAY BUSINESS
Jimmy's Tire & Car Repair Service
Car Mechanic Service
Tomkin's Gift & Gas

Bear's Den (restaurant)
Snowshoe Motel
Colorado Dept. of Transportation building
All Star Gas (propane)

NORTH TO SOUTH – MINERAL COUNTY
**Wason Ranch (guest ranch)
**La Garita Ranch (membership guest ranch)
**4UR (guest ranch)
**Cottonwood Cove (guest ranch & restaurant)
**Blue Creek Lodge (guest Ranch & restaurant)

d:\creede\187.aft

Thomas W. Sefton Trust

Thursday, September 18, 1997

Mr. Donald H. Shank, President
Denver & Rio Grande Railway Foundation
102 ½ West 18th Street
Durango, CO 81301

Dear Don:

It was certainly good news to hear that you will be moving Caboose #0518 this Friday. We are pleased to make this a gift to the Railway Historical Foundation and to know that your plans include its full restoration.

We agreed that we would contribute up to $2,500 to help defray the costs associated with moving the Caboose as well as other related costs. Accordingly you will find our check for that amount enclosed.

As you proceed with the restoration, I am sure the Sefton family would appreciate seeing pictures or videos showing the progress.

Best of luck to you and the Foundation. We all will look forward to seeing the completed work.

Sincerely,

WILLIAM T. STEPHENS, JR. TRUSTEE
THOMAS W. SEFTON TRUST 12-27-82
2550 FIFTH AVE., SUITE 808
SAN DIEGO, CA 92103

SCRIPPS BANK
550 WEST C STREET
SAN DIEGO, CA 92101
90-405/1222

4334

4334

PAY ********** TWO THOUSAND FIVE HUNDRED ********** 00/100 Dollars
DATE AMOUNT

TO THE ORDER OF Denver & Rio Grande Rr Fdn Sep 19 97 **$2,500.00*

Dr. Donald H. Shank, President
Denver & Rio Grande Railway Foundation
102 1/2 West 18th Street
Durango, CO 81301

Memo: caboose restoration-move

⑈004334⑈ ⑆122240502⑆ 032250069⑆

11

SECURITY FEATURES MICRO PRINT TOP & BOTTOM BORDERS - COLORED PATTERN - ARTIFICIAL WATERMARK ON REVERSE SIDE - MISSING FEATURE INDICATES A COPY

DENVER & RIO GRANDE RAILWAY
HISTORICAL FOUNDATION
A COLORADO NON-PROFIT CORPORATION

BOARD OF DIRECTORS:

DONALD H. SHANK
ROBERT W. SHANK
ROBERT A. GRAM
GAYLE A. SHANK

MAIN OFFICE:

102 1/2 West 18th St.
Durango, CO 81301
Tel: 970-259-9498
Fax: 970-259-0095

September 22, 1997

Mr. Thomas W. Sefton
Thomas W. Sefton Trust
Mr. William T. Stephens, Trustee
2550 Fifth Avenue, Suite 808
San Diego, California 92103

Dear Messrs. Sefton and Stephens:

It is with great pleasure that the Board of Directors is able to extend to you both our sincere and heartfelt *THANK YOU* for your donation of Denver & Rio Grande Caboose 0518 and for your generous monetary donation received this A.M. The check will cover all the costs incurred in the moving of the caboose that was completed last Friday and will help in the soon-to-start restoration costs as well.

We were very fortunate to have accomplished the move last week as the weather turned absolutely ugly by Friday evening and proceeded to get even worse through the weekend. The previous site of the caboose turned into a very muddy location as we received in excess of four inches of rain in a short period.

The Silverton Train didn't fair to well either as no trains ran at all today as the roadbed washed away in a couple of locations. Apparently it is nothing major and it should be up and running in a day or two. I am just thankful that we moved the 0518 Friday.

It will be our pleasure to keep you informed of the restoration progress both by written correspondence and by film.

Thank you once again for your most generous donations.

Most sincerely yours,

Donald H. Shank
President

"Dedicated to the Preservation of the Narrow Gauge"

12

File Copy

Schedule of Unusual Gifts or Grants

Date	Benefactor	Amount	Purpose
Oct 97	William Stephens, Trustee Thomas Sefton Trust	$2,500.00	Moving expense & restoration and admin costs
Oct 97	same	1880 Caboose 0518 Valued at $1,900.00	

see attached supporting documentation

(12)

Expenses - Other

1997 Actual

Date	Amount	Description	Purpose
Oct 97	$73.30	Film Processing	Caboose 0518
Oct 97	$90.40	Check Printing	Banking

1998 Proposed

Date	Amount	Description	Purpose
1998	$10,000.00	Materials	Project 0518
1998	$500.00	Misc. Costs	Operation

1999 Proposed

Date	Amount	Description	Purpose
1999	$20,000.00	Materials	Project 0518
1999	$800.00	Misc. Costs	Operation

Schedule of Revenue
"Other Income"

Date	Income Source	Amount of Income
Oct 97 to 12-31-97	Interest Income - Norwest Bank Acct. Foundation Operating Acct	$8.06 @ 1.76%
Jan 98 to 3-20-98	Interest Income - Norwest Bank Acct Foundation Operating Acct.	$1.30 @ 1.76%
Proposed "Other Income" based on projected membership dues and donations		
4-1-98 to 12-31-98	Interest Income - Norwest Bank Acct.	$250.00 @ 1.76% of balance
1-1-99 to 12-31-99	Interest Income - Norwest Bank Acct.	$700.00 @ 1.76% of balance

Contributions Made to Others
Membership in Other Related Foundations
"Proposed"

Date	Organization Name	Amount	Purpose
1998	Colorado Railroad Museum	?	Annual Dues
1998	Colorado Historical Society	?	Annual Dues
1998	National Railway Historical Society	?	Annual Dues

Form **1023**
(Rev. April 1997)
Department of the Treasury
Internal Revenue Service

Application for Recognition of Exemption
Under Section 501(c)(3) of the Internal Revenue Code

OMB No. 1545-0056

If exempt status is approved, this application will be open for public inspection.

Read the instructions for each Part carefully.
A User Fee must be attached to this application.
If the required information and appropriate documents are not submitted along with Form 8718 (with payment of the appropriate user fee), the application may be returned to you.
Complete the Procedural Checklist on page 7 of the instructions.

Part I Identification of Applicant

1a Full name of organization (as shown in organizing document) Denver & Rio Grande Railway Historical Foundation	2 Employer identification number (EIN) (If none, see page 2 of the instructions.) 84-1433680
1b c/o Name (if applicable) Donald H. Shank	3 Name and telephone number of person to be contacted if additional information is needed Donald Shank 970.259.9498
1c Address (number and street) / Room/Suite 1474 Main Avenue / 121	
1d City or town, state, and ZIP code Durango, CO 81301	4 Month the annual accounting period ends December
5 Date incorporated or formed May 30, 1997	6 Activity codes (See page 3 of the instructions.) 060, 062, 119
	7 Check here if applying under section: a ☐ 501(e) b ☐ 501(f) c ☐ 501(k)

8 Did the organization previously apply for recognition of exemption under this Code section or under any other section of the Code? ☐ Yes ☒ No
If "Yes," attach an explanation.

9 Is the organization required to file Form 990 (or Form 990-EZ)? ☒ N/A ☐ Yes ☐ No
If "No," attach an explanation (see page 3 of the Specific Instructions).

Has the organization filed Federal income tax returns or exempt organization information returns? ☐ Yes ☒ No
If "Yes," state the form numbers, years filed, and Internal Revenue office where filed.

11 Check the box for the type of organization. ATTACH A CONFORMED COPY OF THE CORRESPONDING ORGANIZING DOCUMENTS TO THE APPLICATION BEFORE MAILING. (See **Specific Instructions for Part I, Line 11,** on page 3.) Get **Pub. 557, Tax-Exempt Status for Your Organization,** for examples of organizational documents.

a ☒ Corporation—Attach a copy of the Articles of Incorporation (including amendments and restatements) showing approval by the appropriate state official; also include a copy of the bylaws.

b ☐ Trust— Attach a copy of the Trust Indenture or Agreement, including all appropriate signatures and dates.

c ☐ Association—Attach a copy of the Articles of Association, Constitution, or other creating document, with a declaration (see instructions) or other evidence the organization was formed by adoption of the document by more than one person; also include a copy of the bylaws.

If the organization is a corporation or an unincorporated association that has not yet adopted bylaws, check here ▶ ☒

I declare under the penalties of perjury that I am authorized to sign this application on behalf of the above organization and that I have examined this application, including the accompanying schedules and attachments, and to the best of my knowledge it is true, correct, and complete.

Please Sign ▶ Donald H. Shank (Signature) | President and Incorporator (Title or authority of signer) | Mar. 20, 1998 (Date)

For Paperwork Reduction Act Notice, see page 1 of the instructions.

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Part II **Activities and Operational Information**

1 Provide a detailed narrative description of all the activities of the organization—past, present, and planned. **Do not merely refer to or repeat the language in the organizational document.** List each activity separately in the order of importance based on the relative time and other resources devoted to the activity. Indicate the percentage of time for each activity. Each description should include, as a minimum, the following: **(a)** a detailed description of the activity including its purpose and how each activity furthers your exempt purpose; **(b)** when the activity was or will be initiated; and **(c)** where and by whom the activity will be conducted.

The Denver & Rio Grande Railway Historical Foundation was formed for the following purposes: 1. The main function of the Foundation is the acquisition, restoration and preservation of historic railroad equipment, artifacts and memorabilia native to Colorado, New Mexico and Utah. 2. Our ultimate goal is to acquire either through purchase or donation, a parcel of land suitable to construct a restoration facility and museum/display facility for the restored rail artifacts/equipment. The initial task is to locate old retired railcar relics that could become available. They are typically utilized as farm buildings, storage buildings, or just as an interesting "out" building on acreage scattered throughout the three states mentioned in para.1. An excellent emample of our process is as follows: We (the foundation) contacted a property owner last year after discovering an old Caboose on thier land. We wrote the owner asking him of his intentions for the Caboose and asked for it's donation to our Foundation, explaining that we would restore it and display it at a yet-to-be built Museum here in Durango. They agreed to donate it to us and help in the costs to move it and operate the Foundation in the form of a $2,500.00 donation. The car will receive a total rebuild via volunteer labor and hired/compensated professionals and then will be utilized to elevate public awareness to the Foundation and our goal of the Durango Railroad Museum. At this time, we have the commitment for three more historic railcars to be donated to the Foundation. We are planning our first public meeting this April 14th for the main purpose of signing Charter Members to the Foundation and generating interest in our Caboose restoration project. It is our goal to construct the restoration facility in such a manner to allow the viewing of the restoration process from a safe vantage point. This will be available to the schools within our region and civic groups as well. This will become an education benefit to the community as children will be able to see how things were made and how they were used. As donations permit and as the membership grows, the officers and directors of the Foundation will dedicate more and more time to the goal of completing each facet of our plan to create the Durango Railroad Museum Complex. We are all commited to this preservation of Durango's rich rail history that dates back to 1881.

2 What are or will be the organization's sources of financial support? List in order of size.

1. Foundation general membership
2. Charitable donations from the public
3. Donations from local businesses
4. Corporate sponsorship
5. State Historical Society sponsorship
6. National Historical Society sponsors
7. Governmental Grants

3 Describe the organization's fundraising program, both actual and planned, and explain to what extent it has been put into effect. Include details of fundraising activities such as selective mailings, formation of fundraising committees, use of volunteers or professional fundraisers, etc. Attach representative copies of solicitations for financial support.

To date we have not initiated our plan. We are having our first public meeting this April 14th, (see attached invitation) to kick off our membership drive and fund raising plan. We will implement a graduated level of membership (see attached membership form)

Part II **Activities and Operational Information** *(Continued)*

4 Give the following information about the organization's governing body:

a Names, addresses, and titles of officers, directors, trustees, etc.	b Annual compensation
Donald H. Shank, President, General Manager, Chairman of the Board 1474 Main Ave, Suite 121, Durango, CO 81301 Gayle A. Shank, Treasurer, Office Mgr, Director 1474 Main Ave, Suite 121, Durango, CO 81301 Robert W. Shank, Vice Pres, Secretary, Director 1861 Harriett Drive, Clarksville, TN 37040 Robert A. Gram, Director 204 St. Andrews Way, Durango, CO 81301	D.H.Shank-$20.00/hr. until budget provides for salary. Remaining 3 directors are not compensated at this time, but will be as budget permits.

c Do any of the above persons serve as members of the governing body by reason of being public officials or being appointed by public officials? ☐ Yes ☒ No
If "Yes," name those persons and explain the basis of their selection or appointment.

d Are any members of the organization's governing body "disqualified persons" with respect to the organization (other than by reason of being a member of the governing body) or do any of the members have either a business or family relationship with "disqualified persons"? (See **Specific Instructions** for Part II, Line 4d, on page 3.) ☐ Yes ☒ No
If "Yes," explain.

5 Does the organization control or is it controlled by any other organization? ☐ Yes ☒ No
Is the organization the outgrowth of (or successor to) another organization, or does it have a special relationship with another organization by reason of interlocking directorates or other factors? ☐ Yes ☒ No
If either of these questions is answered "Yes," explain.

6 Does or will the organization directly or indirectly engage in any of the following transactions with any political organization or other exempt organization (other than a 501(c)(3) organization): (a) grants; (b) purchases or sales of assets; (c) rental of facilities or equipment; (d) loans or loan guarantees; (e) reimbursement arrangements; (f) performance of services, membership, or fundraising solicitations; or (g) sharing of facilities, equipment, mailing lists or other assets, or paid employees? ☐ Yes ☒ No
If "Yes," explain fully and identify the other organizations involved.

7 Is the organization financially accountable to any other organization? ☐ Yes ☒ No
If "Yes," explain and identify the other organization. Include details concerning accountability or attach copies of reports if any have been submitted.

Part II **Activities and Operational Information** *(Continued)*

8 What assets does the organization have that are used in the performance of its exempt function? (Do not include property producing investment income.) If any assets are not fully operational, explain their status, what additional steps remain to be completed, and when such final steps will be taken. If "None," indicate "N/A." Our Foundation currently has in it's possession one 1880 Caboose in serious need of restoration. We have $468.66 in our bank account prior to including the $465.00 with this application.

9 Will the organization be the beneficiary of tax-exempt bond financing within the next 2 years? ☐ Yes ☒ No

10a Will any of the organization's facilities or operations be managed by another organization or individual under a contractual agreement? ☐ Yes ☒ No

b Is the organization a party to any leases? ☐ Yes ☒ No

If either of these questions is answered "Yes," attach a copy of the contracts and explain the relationship between the applicant and the other parties.

11 Is the organization a membership organization? ☒ Yes ☐ No

If "Yes," complete the following:

a Describe the organization's membership requirements and attach a schedule of membership fees and dues. A genuine sense of pride in Durango's rich rail history and a strong desire to help in the restoration process both physically and financially.

b Describe the organization's present and proposed efforts to attract members and attach a copy of any descriptive literature or promotional material used for this purpose. Our first public meeting to this April 14th. This meeting will kick off our membership and sponsor drive.

c What benefits do (or will) the members receive in exchange for their payment of dues? The satisfaction of supporting the resurection and preservation of historic rail equipment and memorabilia and the eventual building of the Durango Railroad Museum Complex.

12a If the organization provides benefits, services, or products, are the recipients required, or will they be required, to pay for them? ☐ N/A ☒ Yes ☐ No

If "Yes," explain how the charges are determined and attach a copy of the current fee schedule.
We are planning on selling T-shirts and hats depicting the Historical Foundation and each restoration project, ie; Project 0518 (our Caboose) Pricing is not determined at this time.

b Does or will the organization limit its benefits, services, or products to specific individuals or classes of individuals? ☐ N/A ☐ Yes ☒ No

If "Yes," explain how the recipients or beneficiaries are or will be selected.

13 Does or will the organization attempt to influence legislation? ☐ Yes ☒ No

If "Yes," explain. Also, give an estimate of the percentage of the organization's time and funds that it devotes or plans to devote to this activity.

14 Does or will the organization intervene in any way in political campaigns, including the publication or distribution of statements? ☐ Yes ☒ No

If "Yes," explain fully.

20

Part III Technical Requirements

1 Are you filing Form 1023 within 15 months from the end of the month in which your organization was created or formed? . . . . . [X] Yes [ ] No
If you answer "Yes," do not answer questions on lines 2 through 7 below.

2 If one of the exceptions to the 15-month filing requirement shown below applies, check the appropriate box and proceed to question 8.
Exceptions—You are not required to file an exemption application within 15 months if the organization:

[ ] a Is a church, interchurch organization of local units of a church, a convention or association of churches, or an integrated auxiliary of a church. See Specific Instructions, Line 2a, on page 4;

[ ] b Is not a private foundation and normally has gross receipts of not more than $5,000 in each tax year; or

[ ] c Is a subordinate organization covered by a group exemption letter, but only if the parent or supervisory organization timely submitted a notice covering the subordinate.

3 If the organization does not meet any of the exceptions on line 2 above, are you filing Form 1023 within 27 months from the end of the month in which the organization was created or formed? . . . . . [ ] Yes [ ] No

If "Yes," your organization qualifies under section 4.01 of Rev. Proc. 92-85, 1992-2 C.B. 490, for an automatic 12-month extension of the 15-month filing requirement. Do not answer questions 4 through 7.

If "No," answer question 4.

4 If you answer "No" to question 3, has the organization been contacted by the IRS regarding its failure to file Form 1023 within 27 months from the end of the month in which the organization was created or formed? . . . . . [ ] Yes [ ] No

If "No," your organization is requesting an extension of time to apply under the "reasonable action and good faith" requirements of section 5.01 of Rev. Proc. 92-85. Do not answer questions 5 through 7.

If "Yes," answer question 5.

5 If you answer "Yes" to question 4, does the organization wish to request relief from the 15-month filing requirement? . . . . . [ ] Yes [ ] No

If "Yes," give the reasons for not filing this application prior to being contacted by the IRS. See Specific Instructions, Line 5, on page 4 before completing this item. Do not answer questions 6 and 7.

If "No," answer question 6.

6 If you answer "No" to question 5, your organization's qualification as a section 501(c)(3) organization can be recognized only from the date this application is filed with your key District Director. Therefore, do you want us to consider the application as a request for recognition of exemption as a section 501(c)(3) organization from the date the application is received and not retroactively to the date the organization was created or formed? . . . . . [ ] Yes [ ] No

7 If you answer "Yes" to question 6 above and wish to request recognition of section 501(c)(4) status for the period beginning with the date the organization was formed and ending with the date the Form 1023 application was received (the effective date of the organization's section 501(c)(3) status), check here ▶ [ ] and attach a completed page 1 of Form 1024 to this application.

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Part III **Technical Requirements** *(Continued)*

8 Is the organization a private foundation?
☑ Yes (Answer question 9.)
☒ No (Answer question 10 and proceed as instructed.)

9 If you answer "Yes" to question 8, does the organization claim to be a private operating foundation?
☐ Yes (Complete Schedule E.)
☐ No

After answering question 9 on this line, go to line 15 on page 7.

10 If you answer "No" to question 8, indicate the public charity classification the organization is requesting by checking the box below that most appropriately applies:

THE ORGANIZATION IS NOT A PRIVATE FOUNDATION BECAUSE IT QUALIFIES:

a	☐	As a church or a convention or association of churches (CHURCHES MUST COMPLETE SCHEDULE A.)	Sections 509(a)(1) and 170(b)(1)(A)(i)
b	☐	As a school (MUST COMPLETE SCHEDULE B.)	Sections 509(a)(1) and 170(b)(1)(A)(ii)
c	☐	As a hospital or a cooperative hospital service organization, or a medical research organization operated in conjunction with a hospital (MUST COMPLETE SCHEDULE C.)	Sections 509(a)(1) and 170(b)(1)(A)(iii)
d	☐	As a governmental unit described in section 170(c)(1).	Sections 509(a)(1) and 170(b)(1)(A)(v)
e	☐	As being operated solely for the benefit of, or in connection with, one or more of the organizations described in a through **d, g, h,** or **i** (MUST COMPLETE SCHEDULE D.)	Section 509(a)(3)
f	☐	As being organized and operated exclusively for testing for public safety.	Section 509(a)(4)
g	☐	As being operated for the benefit of a college or university that is owned or operated by a governmental unit.	Sections 509(a)(1) and 170(b)(1)(A)(iv)
h	☐	As receiving a substantial part of its support in the form of contributions from publicly supported organizations, from a governmental unit, or from the general public.	Sections 509(a)(1) and 170(b)(1)(A)(vi)
i	☐	As normally receiving not more than one-third of its support from gross investment income and more than one-third of its support from contributions, membership fees, and gross receipts from activities related to its exempt functions (subject to certain exceptions).	Section 509(a)(2)
j	☒	The organization is a publicly supported organization but is not sure whether it meets the public support test of block **h** or block **i**. The organization would like the IRS to decide the proper classification.	Sections 509(a)(1) and 170(b)(1)(A)(vi) or Section 509(a)(2)

If you checked one of the boxes a through f in question 10, go to question 15. If you checked box g in question 10, go to questions 12 and 13. If you checked box h, i, or j, in question 10, go to question 11.

Part III **Technical Requirements** *(Continued)*

11 If you checked box h, i, or j in question 10, has the organization completed a tax year of at least 8 months?
- ☐ Yes—Indicate whether you are requesting:
  - ☐ A definitive ruling (Answer questions 12 through 15.)
  - ☐ An advance ruling (Answer questions 12 and 15 and attach two Forms 872-C completed and signed.)
- ☒ No—**You must request an advance ruling by completing and signing two Forms 872-C and attaching them to the application.**

12 If the organization received any unusual grants during any of the tax years shown in Part IV-A, attach a list for each year showing the name of the contributor; the date and the amount of the grant; and a brief description of the nature of the grant.

We received the donation of one 1880 Caboose and a cash donation of $2,500.00

13 If you are requesting a definitive ruling under section 170(b)(1)(A)(iv) or (vi), check here ▶ ☐ and:

a Enter 2% of line 8, column (e), Total, of Part IV-A. _____

b Attach a list showing the name and amount contributed by each person (other than a governmental unit or "publicly supported" organization) whose total gifts, grants, contributions, etc., were more than the amount entered on line **13a** above.

14 If you are requesting a definitive ruling under section 509(a)(2), check here ▶ ☐ and:

a For each of the years included on lines 1, 2, and 9 of Part IV-A, attach a list showing the name of and amount received from each "disqualified person." (For a definition of "disqualified person," see **Specific Instructions,** Part II, Line 4d, on page 3.)

b For each of the years included on line 9 of Part IV-A, attach a list showing the name of and amount received from each payer (other than a "disqualified person") whose payments to the organization were more than $5,000. For this purpose, "payer" includes, but is not limited to, any organization described in sections 170(b)(1)(A)(i) through (vi) and any governmental agency or bureau.

15 Indicate if your organization is one of the following. If so, complete the required schedule. (Submit only those schedules that apply to your organization. **Do not submit blank schedules.**)	**Yes**	**No**	**If "Yes," complete Schedule:**
Is the organization a church?		X	A
Is the organization, or any part of it, a school?		X	B
Is the organization, or any part of it, a hospital or medical research organization?		X	C
Is the organization a section 509(a)(3) supporting organization?		X	D
Is the organization a private operating foundation?		X	E
Is the organization, or any part of it, a home for the aged or handicapped?		X	F
Is the organization, or any part of it, a child care organization?		X	G
Does the organization provide or administer any scholarship benefits, student aid, etc.?		X	H
Has the organization taken over, or will it take over, the facilities of a "for profit" institution?		X	I

Part IV Financial Data

Complete the financial statements for the current year and for each of the 3 years immediately before it. If in existence less than 4 years, complete the statements for each year in existence. **If in existence less than 1 year, also provide proposed budgets for the 2 years following the current year.**

A. Statement of Revenue and Expenses

		Current tax year	3 prior tax years or proposed budget for 2 years			
		(a) From 1-98 to present	(b) 1997	(c) 1998* *proposed	(d) 1999* *proposed	(e) TOTAL
Revenue	1 Gifts, grants, and contributions received (not including unusual grants—see pages 5 and 6 of the instructions)	Ø	Ø	Ø	Ø	
	2 Membership fees received	Ø		$5,000	$10,000	
	3 Gross investment income (see instructions for definition)	Ø	Ø	Ø	Ø	
	4 Net income from organization's unrelated business activities not included on line 3	Ø	Ø	Ø	Ø	
	5 Tax revenues levied for and either paid to or spent on behalf of the organization	Ø	Ø	Ø	Ø	
	6 Value of services or facilities furnished by a governmental unit to the organization without charge (not including the value of services or facilities generally furnished the public without charge)	Ø	Ø	Ø	Ø	
	7 Other income (not including gain or loss from sale of capital assets) (attach schedule)	$1.30	$8.06	$250.00	$700.00	
	8 Total (add lines 1 through 7)	$1.30	$8.06	$5,250.00	$10,700.00	
	9 Gross receipts from admissions, sales of merchandise or services, or furnishing of facilities in any activity that is not an unrelated business within the meaning of section 513. Include related cost of sales on line 22	Ø	Ø	$750.00	$2,500.00	
	10 Total (add lines 8 and 9)	$1.30	$8.06	$6,000.00	$13,200.00	
	11 Gain or loss from sale of capital assets (attach schedule)	Ø	Ø	Ø	Ø	
	12 Unusual grants	Ø	$2,500.00	$20,000.00	$50,000.00	
	13 Total revenue (add lines 10 through 12)	$1.30	$2,508.06	$26,000.00	$63,200.00	
Expenses	14 Fundraising expenses	Ø	Ø	$1,500.00	$4,000.00	
	15 Contributions, gifts, grants, and similar amounts paid (attach schedule)	Ø	Ø	$100.00	$200.00	
	16 Disbursements to or for benefit of members (attach schedule)	Ø	Ø	Ø	Ø	
	17 Compensation of officers, directors, and trustees (attach schedule)	Ø	$1,200.00	$5,000.00	$15,000.00	
	18 Other salaries and wages	Ø	Ø	$6,500.00	$17,500.00	
	19 Interest	Ø	Ø	Ø	Ø	
	20 Occupancy (rent, utilities, etc.)	Ø	$677.00	$2,400.00	$2,400.00	
	21 Depreciation and depletion	Ø	Ø	Ø	Ø	
	22 Other (attach schedule)	Ø	$163.70	$10,500	$20,800	
	23 Total expenses (add lines 14 through 22)	Ø	$2,040.70	$26,000.00	$59,900.00	
	24 Excess of revenue over expenses (line 13 minus line 23)	$1.30	$467.36	Ø	$3,300.00	

Part IV **Financial Data** *(Continued)*

B. Balance Sheet (at the end of the period shown)		Current tax year Date_____
Assets		
1 Cash	1	$468.66
2 Accounts receivable, net	2	Ø
3 Inventories	3	Ø
4 Bonds and notes receivable (attach schedule)	4	Ø
5 Corporate stocks (attach schedule)	5	Ø
6 Mortgage loans (attach schedule)	6	Ø
7 Other investments (attach schedule)	7	Ø
8 Depreciable and depletable assets (attach schedule)	8	Ø
9 Land	9	Ø
10 Other assets (attach schedule) Unrestored 1880 Caboose	10	$1,900.00
11 **Total assets** (add lines 1 through 10)	11	$2,368.66
Liabilities		
12 Accounts payable Deferred compensation to President/Director	12	$2,350.00
13 Contributions, gifts, grants, etc., payable	13	Ø
14 Mortgages and notes payable (attach schedule)	14	Ø
15 Other liabilities (attach schedule)	15	Ø
16 **Total liabilities** (add lines 12 through 15)	16	$2,350.00
Fund Balances or Net Assets		
17 Total fund balances or net assets	17	$18.66
18 **Total liabilities and fund balances or net assets** (add line 16 and line 17)	18	$2,368.66

If there has been any substantial change in any aspect of the organization's financial activities since the end of the period shown above, check the box and attach a detailed explanation ▶ ☐

Form **8718**
(Rev. September 1997)
Department of the Treasury
Internal Revenue Service

User Fee for Exempt Organization Determination Letter Request

▶ Attach this form to determination letter application.
(Form 8718 is NOT a determination letter application.)

For IRS Use Only
Control number _____
Amount paid _____
User fee screener

1 Name of organization: Denver & Rio Grande Historical Foundation

2 Employer Identification Number: 84-1433680

Caution: *Do not attach Form 8718 to an application for a pension plan determination letter. Use Form 8717 instead.*

3 **Type of request** — Fee

a ☐ Initial request for a determination letter for:
- An exempt organization that has had annual gross receipts averaging not more than $10,000 during the preceding 4 years, or
- A new organization that anticipates gross receipts averaging not more than $10,000 during its first 4 years . . ▶ $150

Note: *If you checked box 3a, you must complete the Certification below.*

Certification

If certify that the annual gross receipts of _____ (name of organization) have averaged (or are expected to average) not more than $10,000 during the preceding 4 (or the first 4) years of operation.

Signature ▶ Title ▶

b ☒ Initial request for a determination letter for:
- An exempt organization that has had annual gross receipts averaging more than $10,000 during the preceding 4 years, or
- A new organization that anticipates gross receipts averaging more than $10,000 during its first 4 years . . . . . ▶ $465

c ☐ Group exemption letters . . . . . ▶ $500

Instructions

The law requires payment of a user fee with each application for a determination letter. The user fees are listed on line 3 [illegible] For more information, see Rev. [illegible]97-8, 1997-1 I.R.B. 187.

Check the box on line 3 for the type of application you are submitting. If you check box 3a, you must complete and sign the certification statement that appears under line 3a.

Attach to Form 8718 a check or money order payable to the Internal Revenue Service for the full amount of the user fee. If you do not include the full amount, your application will be returned. Attach Form 8718 to your determination letter application.

Send the determination letter application and Form 8718 to:

Internal Revenue Service
P.O. Box 192
Covington, KY 41012-0192

If you are using express mail or a delivery service, send the application and Form 8718 to:

Internal Revenue Service
201 West Rivercenter Blvd.
Attn: Extracting Stop 312
Covington, KY 41011

DENVER & RIO GRANDE RAILWAY 09-97
HISTORICAL FOUNDATION
102 1/2 W. 16TH ST.
DURANGO, CO 81301
970-259-9498

1005

DATE MAR 30, 1998

THE ORDER OF INTERNAL REVENUE SERVICE $ $465.00

FOUR HUNDRED SIXTY-FIVE & 00/100 DOLLARS

Norwest Bank Colorado, N.A.
Durango
(970) 247-3242
1063 Main Avenue
Durango, Colorado 81301

Donald H. Shank

USER FEE FOR EXEMPT ORGANIZATION Gayle Shank

⑈001005⑈ ⑆102000076⑆ 6498008785⑈

Form **872-C**

(Rev. April 1996)

Department of the Treasury
Internal Revenue Service

Consent Fixing Period of Limitation Upon Assessment of Tax Under Section 4940 of the Internal Revenue Code

(See instructions on reverse side.)

OMB No. 1545-0056

To be used with Form 1023. Submit in duplicate.

Under section 6501(c)(4) of the Internal Revenue Code, and as part of a request filed with Form 1023 that the organization named below be treated as a publicly supported organization under section 170(b)(1)(A)(vi) or section 509(a)(2) during an advance ruling period,

Denver & Rio Grande Railway Historical Foundation
(Exact legal name of organization as shown in organizing document)

1474 Main Avenue, Suite 121, Durango, CO 81301
(Number, street, city or town, state, and ZIP code)

} and the District Director of Internal Revenue, or Assistant Commissioner (Employee Plans and Exempt Organizations)

Consent and agree that the period for assessing tax (imposed under section 4940 of the Code) for any of the 5 tax years in the advance ruling period will extend 8 years, 4 months, and 15 days beyond the end of the first tax year.

However, if a notice of deficiency in tax for any of these years is sent to the organization before the period expires, the time for making an assessment will be further extended by the number of days the assessment is prohibited, plus 60 days.

Ending date of first tax year December 31, 1997
(Month, day, and year)

ame of organization (as shown in organizing document) Denver & Rio Grande Railway Historical Foundation	Date March 20, 1998
fficer or trustee having authority to sign Donald H. Shank, President/Chairman gnature ►	Title ► President
or IRS use only	
is Director or Assistant Commissioner (Employee Plans and Exempt Organizations)	Date
►	

27

r Paperwork Reduction Act Notice, see page 1 of the Form 1023 Instructions.

Form **990** (15)

Department of the Treasury
Internal Revenue Service

Return of Organization Exempt From Income Tax

Under section 501(c) of the Internal Revenue Code (except black lung benefit trust or private foundation) or section 4947(a)(1) nonexempt charitable trust

Note: *The organization may have to use a copy of this return to satisfy state reporting requirements.*

OMB No. 1545-0047

1999

This Form is Open to Public Inspection

A For the 1999 calendar year, OR tax year period beginning , 1999, and ending ,

B Check if:
- ☐ Change of address
- ☐ Initial return
- ☐ Final return
- ☐ Amended return (required also for state reporting)

Please use IRS label or print or type. See Specific Instructions.

C Name of organization: DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION

Number and street (or P.O. box if mail is not delivered to street address): 1474 MAIN AVE, SUITE — Room/suite:

City or town, state or country, and ZIP+4: DURANGO, COLORADO 81301

D Employer identification number: 84-1433680

E Telephone number: (970) 259-9498

F Check ► ☐ if exemption application is pending

G Type of organization— ► ■ Exempt under section 501(c)(3) ◄ (insert number) OR ► ☐ section 4947(a)(1) nonexempt charitable trust

Note: *Section 501(c)(3) exempt organizations and 4947(a)(1) nonexempt charitable trusts MUST attach a completed Schedule A (Form 990).*

H(a) Is this a group return filed for affiliates? ☐ Yes ■ No

(b) If "Yes," enter the number of affiliates for which this return is filed: ►

(c) Is this a separate return filed by an organization covered by a group ruling? ☐ Yes ■ No

I If either box in H is checked "Yes," enter four-digit group exemption number (GEN) ►

J Accounting method: ■ Cash ☐ Accrual ☐ Other (specify) ►

K Check here ► ☐ if the organization's gross receipts are normally not more than $25,000. The organization need not file a return with the IRS; but if it received a Form 990 Package in the mail, it should file a return without financial data. **Some states require a complete return.**

Note: *Form 990-EZ may be used by organizations with gross receipts less than $100,000 and total assets less than $250,000 at end of year.*

Revenue, Expenses, and Changes in Net Assets or Fund Balances (See Specific Instructions on page 15.)

Revenue	1	Contributions, gifts, grants, and similar amounts received:			
	a	Direct public support	1a	250,000	
	b	Indirect public support	1b	202,464	
	c	Government contributions (grants)	1c		
	d	Total (add lines 1a through 1c) (attach schedule of contributors) (cash $ _____ noncash $ _____)			1d 452,464
	2	Program service revenue including government fees and contracts (from Part VII, line 93)			2
	3	Membership dues and assessments			3
	4	Interest on savings and temporary cash investments			4 79
	5	Dividends and interest from securities			5
	6a	Gross rents	6a		
	b	Less: rental expenses	6b		
	c	Net rental income or (loss) (subtract line 6b from line 6a)			6c
	7	Other investment income (describe ►)			7
	8a	Gross amount from sales of assets other than inventory — (A) Securities / (B) Other	8a		
	b	Less: cost or other basis and sales expenses	8b		
	c	Gain or (loss) (attach schedule)	8c		
	d	Net gain or (loss) (combine line 8c, columns (A) and (B))			8d
	9	Special events and activities (attach schedule)			
	a	Gross revenue (not including $ _____ of contributions reported on line 1a)	9a		
	b	Less: direct expenses other than fundraising expenses	9b		
	c	Net income or (loss) from special events (subtract line 9b from line 9a)			9c
	10a	Gross sales of inventory, less returns and allowances	10a		
	b	Less: cost of goods sold	10b		
	c	Gross profit or (loss) from sales of inventory (attach schedule) (subtract line 10b from line 10a)			10c
	11	Other revenue (from Part VII, line 103)			11
	12	**Total revenue** (add lines 1d, 2, 3, 4, 5, 6c, 7, 8d, 9c, 10c, and 11)			12 452,543
Expenses	13	Program services (from line 44, column (B))			13 10,366
	14	Management and general (from line 44, column (C))			14 17,295
	15	Fundraising (from line 44, column (D))			15 -0-
	16	Payments to affiliates (attach schedule)			16 -0-
	17	**Total expenses** (add lines 16 and 44, column (A))			17 27,661
Net Assets	18	Excess or (deficit) for the year (subtract line 17 from line 12)			18 274,882
	19	Net assets or fund balances at beginning of year (from line 73, column (A))			19 25,450 28
	20	Other changes in net assets or fund balances (attach explanation)			20 141,117
	21	Net assets or fund balances at end of year (combine lines 18, 19, and 20)			21 441,449

Statement of Functional Expenses

All organizations must complete column (A). Columns (B), (C), and (D) are required for section 501(c)(3) and (4) organizations and section 4947(a)(1) nonexempt charitable trusts but optional for others. (See Specific Instructions on page 19.)

Do not include amounts reported on line 6b, 8b, 9b, 10b, or 16 of Part I.		(A) Total	(B) Program services	(C) Management and general	(D) Fundraising
22 Grants and allocations (attach schedule) (cash $ _____ noncash $ _____)	22				
23 Specific assistance to individuals (attach schedule)	23				
24 Benefits paid to or for members (attach schedule)	24				
25 Compensation of officers, directors, etc.	25				
26 Other salaries and wages	26				
27 Pension plan contributions	27				
28 Other employee benefits	28				
29 Payroll taxes	29				
30 Professional fundraising fees	30	200	200		
31 Accounting fees	31				
32 Legal fees	32	7,568		7,568	
33 Supplies	33	449		449	
34 Telephone	34	719		719	
35 Postage and shipping	35	441		441	
36 Occupancy	36	4,225		4,225	
37 Equipment rental and maintenance	37				
38 Printing and publications	38	1,407	27	1380	
39 Travel	39	514	514		
40 Conferences, conventions, and meetings	40	225	225		
41 Interest	41				
42 Depreciation, depletion, etc. (attach schedule)	42	1,949		1,949	
43 Other expenses (itemize): a	43a				
b ASBESTOS ABATEMENT	43b	9,100	9,100		
c INSURANCE	43c	564		564	
d DAY LABOR	43d	300	300		
e	43e				
44 Total functional expenses (add lines 22 through 43). Organizations completing columns (B)-(D), carry these totals to lines 13–15	44	27,661	10,366	17,295	

Reporting of Joint Costs. Did you report in column (B) (Program services) any joint costs from a combined educational campaign and fundraising solicitation? ▶ ☐ Yes ■ No

If "Yes," enter (i) the aggregate amount of these joint costs $_____; (ii) the amount allocated to Program services $_____; (iii) the amount allocated to Management and general $_____; and (iv) the amount allocated to Fundraising $_____

Statement of Program Service Accomplishments (See Specific Instructions on page 22.)

What is the organization's primary exempt purpose? ▶

All organizations must describe their exempt purpose achievements in a clear and concise manner. State the number of clients served, publications issued, etc. Discuss achievements that are not measurable. (Section 501(c)(3) and (4) organizations and 4947(a)(1) nonexempt charitable trusts must also enter the amount of grants and allocations to others.)

Program Service Expenses (Required for 501(c)(3) and (4) orgs., and 4947(a)(1) trusts, but optional for others.)

a _____ (Grants and allocations $ _____)

b _____ (Grants and allocations $ _____)

c _____ (Grants and allocations $ _____)

d _____ (Grants and allocations $ _____) 29

e Other program services (attach schedule) (Grants and allocations $ _____) -0-

f **Total of Program Service Expenses** (should equal line 44, column (B), Program services) ▶ 10,366

Balance Sheets (See Specific Instructions on page 22.)

Note: Where required, attached schedules and amounts within the description column should be for end-of-year amounts only.			(A) Beginning of year		(B) End of year
Assets	45	Cash—non-interest-bearing		45	1,108
	46	Savings and temporary cash investments		46	513
	47a	Accounts receivable 47a			
	b	Less: allowance for doubtful accounts 47b		47c	
	48a	Pledges receivable 48a 150,000			
	b	Less: allowance for doubtful accounts 48b		48c	150,000
	49	Grants receivable		49	
	50	Receivables from officers, directors, trustees, and key employees (attach schedule)		50	
	51a	Other notes and loans receivable (attach schedule) 51a			
	b	Less: allowance for doubtful accounts 51b		51c	
	52	Inventories for sale or use		52	
	53	Prepaid expenses and deferred charges		53	
	54	Investments—securities (attach schedule)		54	
	55a	Investments—land, buildings, and equipment: basis 55a 34,000			
	b	Less: accumulated depreciation (attach schedule) 55b -0-		55c	34,000
	56	Investments—other (attach schedule)		56	
	57a	Land, buildings, and equipment: basis 57a 631,416			
	b	Less: accumulated depreciation (attach schedule) 57b 972		57c	630,444
	58	Other assets (describe ▶)		58	
	59	**Total assets** (add lines 45 through 58) (must equal line 74)		59	816,065
Liabilities	60	Accounts payable and accrued expenses		60	
	61	Grants payable		61	
	62	Deferred revenue		62	
	63	Loans from officers, directors, trustees, and key employees (attach schedule)		63	
	64a	Tax-exempt bond liabilities (attach schedule)		64a	
	b	Mortgages and other notes payable (attach schedule)		64b	374,616
	65	Other liabilities (describe ▶)		65	
	66	**Total liabilities** (add lines 60 through 65)		66	
Net Assets or Fund Balances		**Organizations that follow SFAS 117, check here** ▶ ☐ and complete lines 67 through 69 and lines 73 and 74.			
	67	Unrestricted		67	
	68	Temporarily restricted		68	
	69	Permanently restricted		69	
		Organizations that do not follow SFAS 117, check here ▶ ■ and complete lines 70 through 74.			
	70	Capital stock, trust principal, or current funds		70	
	71	Paid-in or capital surplus, or land, building, and equipment fund		71	
	72	Retained earnings, endowment, accumulated income, or other funds		72	
	73	**Total net assets or fund balances** (add lines 67 through 69 OR lines 70 through 72; column (A) must equal line 19 and column (B) must equal line 21)	25,450	73	441,449
	74	**Total liabilities and net assets / fund balances** (add lines 66 and 73)		74	816,065

Form 990 is available for public inspection and, for some people, serves as the primary or sole source of information about a particular organization. How the public perceives an organization in such cases may be determined by the information presented on its return. Therefore, please make sure the return is complete and accurate and fully describes, in Part III, the organization's programs and accomplishments.

Reconciliation of Revenue per Audited Financial Statements with Revenue per Return (See Specific Instructions, page 24.)

a	Total revenue, gains, and other support per audited financial statements . . ▶	a	415,993
b	Amounts included on line a but not on line 12, Form 990:		
	(1) Net unrealized gains on investments . . $		
	(2) Donated services and use of facilities $		
	(3) Recoveries of prior year grants . . . $		
	(4) Other (specify): .... $		
	Add amounts on lines (1) through (4) ▶	b	
c	Line a minus line b. . . . . ▶	c	
d	Amounts included on line 12, Form 990 but not on line a:		
	(1) Investment expenses not included on line 6b, Form 990 . . . $		
	(2) Other (specify): .... $		
	Add amounts on lines (1) and (2) ▶	d	
e	Total revenue per line 12, Form 990 (line c plus line d) . . . . . ▶	e	415,993

Reconciliation of Expenses per Audited Financial Statements with Expenses per Return

a	Total expenses and losses per audited financial statements . . ▶	a	27,691
b	Amounts included on line a but not on line 17, Form 990:		
	(1) Donated services and use of facilities $		
	(2) Prior year adjustments reported on line 20, Form 990 . . . . $		
	(3) Losses reported on line 20, Form 990 . $		
	(4) Other (specify): .... $		
	Add amounts on lines (1) through (4) ▶	b	
c	Line a minus line b . . . . . ▶	c	
d	Amounts included on line 17, Form 990 but not on line a:		
	(1) Investment expenses not included on line 6b, Form 990. . . $		
	(2) Other (specify): .... $		
	Add amounts on lines (1) and (2) ▶	d	
e	Total expenses per line 17, Form 990 (line c plus line d) . . . . . ▶	e	27,691

List of Officers, Directors, Trustees, and Key Employees (List each one even if not compensated; see Specific Instructions on page 24.)

(A) Name and address	(B) Title and average hours per week devoted to position	(C) Compensation (If not paid, enter -0-.)	(D) Contributions to employee benefit plans & deferred compensation	(E) Expense account and other allowances
DONALD H. SHANK 1474 MAIN AVE, STE 223 DURANGO, CO	FOUNDER / CHAIRMAN 60 HRS	-0-	-0-	-0-
ROBERT W. SHANK 1861 HARRIETT DR. CLARKSVILLE, TN	VICE-CHAIRMAN SECRETARY -0-	-0-	-0-	-0-
RICHARD L. MILLARD 601 ANIMAS VIEW DR DURANGO, CO	TREASURER 1 HR	-0-	-0-	-0-
MARTIN P. PIRNAT 1474 MAIN AVE, STE 223 DURANGO, CO	DIRECTOR -0-	-0-	-0-	-0-
WILLIAM COLLEY 1474 MAIN AVE, STE 223 DURANGO, CO	DIRECTOR -0-	-0-	-0-	-0-
ROBERT A. GRAM 1474 MAIN AVE, STE 223 DURANGO CO	DIRECTOR -0-	-0-	-0-	-0-
				(31)

75 Did any officer, director, trustee, or key employee receive aggregate compensation of more than $100,000 from your organization and all related organizations, of which more than $10,000 was provided by the related organizations? ▶ ☐ Yes ☒ No

If "Yes," attach schedule—see Specific Instructions on page 25.

Analysis of Income-Producing Activities (See Specific Instructions on page 29.)

Enter gross amounts unless otherwise indicated.	Unrelated business income (A) Business code	(B) Amount	Excluded by section 512, 513, or 514 (C) Exclusion code	(D) Amount	(E) Related or exempt function income
93 Program service revenue:					
a DIRECT PUBLIC SUPPORT		250,000			
b INDIRECT PUBLIC SUPPORT		202,464			
c					
d					
e					
f Medicare/Medicaid payments					
g Fees and contracts from government agencies					
94 Membership dues and assessments		150,000			
95 Interest on savings and temporary cash investments		79			
96 Dividends and interest from securities					
97 Net rental income or (loss) from real estate:					
a debt-financed property					
b not debt-financed property					
98 Net rental income or (loss) from personal property					
99 Other investment income					
100 Gain or (loss) from sales of assets other than inventory					
101 Net income or (loss) from special events					
102 Gross profit or (loss) from sales of inventory					
103 Other revenue: a					
b					
c					
d					
e					
104 Subtotal (add columns (B), (D), and (E))		452,543			
105 Total (add line 104, columns (B), (D), and (E)) ▶					452,543

Note: *Line 105 plus line 1d, Part I, should equal the amount on line 12, Part I.*

Relationship of Activities to the Accomplishment of Exempt Purposes (See Specific Instructions on page 30.)

Line No. ▼	Explain how each activity for which income is reported in column (E) of Part VII contributed importantly to the accomplishment of the organization's exempt purposes (other than by providing funds for such purposes).

Information Regarding Taxable Subsidiaries and Disregarded Entities (See Specific Instructions on page 30.)

(A) Name, address, and EIN of corporation, partnership, or disregarded entity	(B) Percentage of ownership interest	(C) Nature of activities	(D) Total income	(E) End-of-year assets
	%			
	%			
	%			
	%			

Please Sign Here

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than officer) is based on all information of which preparer has any knowledge. (Important: See General Instruction U, on page 14.)

▶ [signature] Signature of officer | 11-28-00 Date | ▶ DONALD H. SHANK, PRESIDENT Type or print name and title.

Paid Preparer's Use Only

Preparer's signature ▶ [signature]	Date 11/28/00	Check if self-employed ▶ ☐	Preparer's SSN or PTIN 523-25-7195 33
Firm's name (or yours if self-employed) and address ▶ DJ'S BOOKKEEPING SERVICE PO BOX 3789 DURANGO, CO		EIN ▶	
		ZIP + 4 ▶ 81301	

Form **4562**

Department of the Treasury
Internal Revenue Service (99)

Depreciation and Amortization
(Including Information on Listed Property)

j See separate instructions. j Attach this form to your return.

OMB No. 1545-0172

1999

Attachment Sequence No. 67

Name(s) shown on return: DENVER & RIO GRANDE RAILWAY HIST. FOUND.

Business or activity to which this form relates:

Identifying number: 84-1433690

Part I Election To Expense Certain Tangible Property (Section 179) (Note: If you have any "listed property," complete Part V before you complete Part I.)

1	Maximum dollar limitation. If an enterprise zone business, see page 2 of the instructions	1	$19,000
2	Total cost of section 179 property placed in service. See page 2 of the instructions	2	-0-
3	Threshold cost of section 179 property before reduction in limitation	3	$200,000
4	Reduction in limitation. Subtract line 3 from line 2. If zero or less, enter -0-	4	
5	Dollar limitation for tax year. Subtract line 4 from line 1. If zero or less, enter -0-. If married filing separately, see page 2 of the instructions	5	

	(a) Description of property	(b) Cost (business use only)	(c) Elected cost
6			

7	Listed property. Enter amount from line 27	7		
8	Total elected cost of section 179 property. Add amounts in column (c), lines 6 and 7		8	
9	Tentative deduction. Enter the smaller of line 5 or line 8		9	
10	Carryover of disallowed deduction from 1998. See page 2 of the instructions		10	
11	Business income limitation. Enter the smaller of business income (not less than zero) or line 5 (see instructions)		11	
12	Section 179 expense deduction. Add lines 9 and 10, but do not enter more than line 11		12	
13	Carryover of disallowed deduction to 2000. Add lines 9 and 10, less line 12 j	13		

Note: Do not use Part II or Part III below for listed property (automobiles, certain other vehicles, cellular telephones, certain computers, or property used for entertainment, recreation, or amusement). Instead, use Part V for listed property.

Part II MACRS Depreciation For Assets Placed in Service ONLY During Your 1999 Tax Year (Do Not Include Listed Property.)

Section A – General Asset Account Election

14 If you are making the election under section 168(i)(4) to group any assets placed in service during the tax year into one or more general asset accounts, check this box. See page 3 of the instructions j ☐

Section B – General Depreciation System (GDS) (See page 3 of the instructions.)

	(a) Classification of property	(b) Month and year placed in service	(c) Basis for depreciation (business/investment use only-see instructions)	(d) Recovery period	(e) Convention	(f) Method	(g) Depreciation deduction
15a	3-year property						
b	5-year property						
c	7-year property		SEE LIST	7	200DB	MACRS	972
d	10-year property						
e	15-year property						
f	20-year property						
g	25-year property			25 yrs.		S/L	
h	Residential rental property			27.5 yrs.	MM	S/L	
				27.5 yrs.	MM	S/L	
i	Nonresidential real property			39 yrs.	MM	S/L	
					MM	S/L	

Section C – Alternative Depreciation System (ADS) (See page 5 of the instructions.)

16a	Class life				S/L	
b	12-year			12 yrs.	S/L	
c	40-year			40 yrs.	MM	S/L

Part III Other Depreciation (Do Not Include Listed Property.) (See page 5 of the instructions.)

17	GDS and ADS deductions for assets placed in service in tax years beginning before 1999	17	
18	Property subject to section 168(f)(1) election	18	
19	ACRS and other depreciation	19	

Part IV Summary (See page 6 of the instructions.)

20	Listed property. Enter amount from line 26	20	
21	Total. Add deductions on line 12, lines 15 and 16 in column (g), and lines 17 through 20. Enter here and on the appropriate lines of your return. Partnerships and S corporations - see instructions	21	972 34
22	For assets shown above and placed in service during the current year, enter the portion of the basis attributable to section 263A costs 22		

Depreciation Detail Listing

1999

For your records only

Name(s) as shown on return: DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION

Social security number/EIN: 84-1433680

No.	Description	Date	Cost	Salvage	Business percentage	Section 179	Depreciation Basis	Life	Method	Rate	Current depr.	Prior deduction	Prior expense	AMT Method	AMT Life	AMT Current
1	LINK & PIN	2/2/99	400				400	7	MACRS	14.29	57					
2	2- 8'X16' TRANS	4/27/99	3000				3000	7	MACRS	14.29	429					
3	MISC RR ITEMS	8/19/99	200				200	7	MACRS	14.29	29					
1a	1880 CABOOSE #0518	8/9/99	700				700	7	MACRS	14.29	100					
2a	1890 DINING CAR STANDARD GAUGE		2500				2500	7	MACRS	14.29	357					
1b	CREEDE BRANCH	8/10/99	624,616				624,616	-	———	—						
1C	LAND-SILVERTON 7.369 ACRES	1/3/99	34,000				34,000	-	———	—						
							665,416				972					

SCHEDULE A (Form 990)

Department of the Treasury
Internal Revenue Service

Organization Exempt Under Section 501(c)(3)

(Except Private Foundation) and Section 501(e), 501(f), 501(k), 501(n), or Section 4947(a)(1) Nonexempt Charitable Trust

Supplementary Information—(See separate instructions.)

▶ **MUST be completed by the above organizations and attached to their Form 990 or 990-EZ**

OMB No. 1545-0047

1999

Name of the organization: DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION

Employer identification number: 84 1433680

Compensation of the Five Highest Paid Employees Other Than Officers, Directors, and Trustees

(See page 1 of the instructions. List each one. If there are none, enter "None.")

(a) Name and address of each employee paid more than $50,000	(b) Title and average hours per week devoted to position	(c) Compensation	(d) Contributions to employee benefit plans & deferred compensation	(e) Expense account and other allowances
Total number of other employees paid over $50,000 ▶	-0-			

Compensation of the Five Highest Paid Independent Contractors for Professional Services

(See page 1 of the instructions. List each one (whether individuals or firms). If there are none, enter "None.")

(a) Name and address of each independent contractor paid more than $50,000	(b) Type of service	(c) Compensation
		36
Total number of others receiving over $50,000 for professional services ▶ -0-		

Statements About Activities

		Yes	No
1	During the year, has the organization attempted to influence national, state, or local legislation, including any attempt to influence public opinion on a legislative matter or referendum? . . . . . If "Yes," enter the total expenses paid or incurred in connection with the lobbying activities ► $ _____ Organizations that made an election under section 501(h) by filing Form 5768 must complete Part VI-A. Other organizations checking "Yes," must complete Part VI-B AND attach a statement giving a detailed description of the lobbying activities.	1		X
2	During the year, has the organization, either directly or indirectly, engaged in any of the following acts with any of its trustees, directors, officers, creators, key employees, or members of their families, or with any taxable organization with which any such person is affiliated as an officer, director, trustee, majority owner, or principal beneficiary:			
a	Sale, exchange, or leasing of property?	2a		X
b	Lending of money or other extension of credit?	2b		X
c	Furnishing of goods, services, or facilities?	2c		X
d	Payment of compensation (or payment or reimbursement of expenses if more than $1,000)?	2d		X
e	Transfer of any part of its income or assets? . . . . . If the answer to any question is "Yes," attach a detailed statement explaining the transactions.	2e		X
3	Does the organization make grants for scholarships, fellowships, student loans, etc.?	3		X
4a	Do you have a section 403(b) annuity plan for your employees?	4a		X
b	Attach a statement to explain how the organization determines that individuals or organizations receiving grants or loans from it in furtherance of its charitable programs qualify to receive payments. (See page 2 of the instructions.)			

Reason for Non-Private Foundation Status (See pages 2 through 4 of the instructions.)

The organization is not a private foundation because it is: (Please check only **ONE** applicable box.)

5 ☐ A church, convention of churches, or association of churches. Section 170(b)(1)(A)(i).

6 ☐ A school. Section 170(b)(1)(A)(ii). (Also complete Part V, page 4.)

7 ☐ A hospital or a cooperative hospital service organization. Section 170(b)(1)(A)(iii).

8 ☐ A Federal, state, or local government or governmental unit. Section 170(b)(1)(A)(v).

9 ☐ A medical research organization operated in conjunction with a hospital. Section 170(b)(1)(A)(iii). **Enter the hospital's name, city, and state** ► .....

10 ☐ An organization operated for the benefit of a college or university owned or operated by a governmental unit. Section 170(b)(1)(A)(iv). (Also complete the **Support Schedule** in Part IV-A.)

11a ☐ An organization that normally receives a substantial part of its support from a governmental unit or from the general public. Section 170(b)(1)(A)(vi). (Also complete the **Support Schedule** in Part IV-A.)

11b ☐ A community trust. Section 170(b)(1)(A)(vi). (Also complete the **Support Schedule** in Part IV-A.)

12 ■ An organization that normally receives: **(1) more than 33⅓%** of its support from contributions, membership fees, and gross receipts from activities related to its charitable, etc., functions—subject to certain exceptions, and **(2) no more than 33⅓%** of its support from gross investment income and unrelated business taxable income (less section 511 tax) from businesses acquired by the organization after June 30, 1975. See section 509(a)(2). (Also complete the **Support Schedule** in Part IV-A.)

13 ☐ An organization that is not controlled by any disqualified persons (other than foundation managers) and supports organizations described in: **(1)** lines 5 through 12 above; or **(2)** section 501(c)(4), (5), or (6), if they meet the test of section 509(a)(2). (See section 509(a)(3).)

Provide the following information about the supported organizations. (See page 4 of the instructions.)

(a) Name(s) of supported organization(s)	(b) Line number from above

37

14 ☐ An organization organized and operated to test for public safety. Section 509(a)(4). (See page 4 of the instructions.)

Support Schedule (Complete only if you checked a box on line 10, 11, or 12.) *Use cash method of accounting.*

Note: *You may use the worksheet in the instructions for converting from the accrual to the cash method of accounting.*

Calendar year (or fiscal year beginning in) ▶	(a) 1998	(b) 1997	(c) 1996	(d) 1995	(e) Total
15 Gifts, grants, and contributions received. (Do not include unusual grants. See line 28.)					
16 Membership fees received	20,000				20,000
17 Gross receipts from admissions, merchandise sold or services performed, or furnishing of facilities in any activity that is not a business unrelated to the organization's charitable, etc., purpose					
18 Gross income from interest, dividends, amounts received from payments on securities loans (section 512(a)(5)), rents, royalties, and unrelated business taxable income (less section 511 taxes) from businesses acquired by the organization after June 30, 1975					
19 Net income from unrelated business activities not included in line 18					
20 Tax revenues levied for the organization's benefit and either paid to it or expended on its behalf					
21 The value of services or facilities furnished to the organization by a governmental unit without charge. Do not include the value of services or facilities generally furnished to the public without charge					
22 Other income. Attach a schedule. Do not include gain or (loss) from sale of capital assets					
23 Total of lines 15 through 22	20,000				20,000
24 Line 23 minus line 17					
25 Enter 1% of line 23	200				

26 Organizations described on lines 10 or 11:

a Enter 2% of amount in column (e), line 24 ▶ 26a -0-

b Attach a list (which is not open to public inspection) showing the name of and amount contributed by each person (other than a governmental unit or publicly supported organization) whose total gifts for 1995 through 1998 exceeded the amount shown in line 26a. Enter the sum of all these excess amounts ▶ 26b

c Total support for section 509(a)(1) test: Enter line 24, column (e) ▶ 26c

d Add: Amounts from column (e) for lines: 18 _____ 19 _____ 22 _____ 26b _____ ▶ 26d

e Public support (line 26c minus line 26d total) ▶ 26e

f **Public support percentage (line 26e (numerator) divided by line 26c (denominator))** ▶ 26f %

27 Organizations described on line 12: a For amounts included in lines 15, 16, and 17 that were received from a "disqualified person," attach a list to show the name of, and total amounts received in each year from, each "disqualified person." Enter the sum of such amounts for each year:

(1998) ..... (1997) ..... (1996) ..... (1995) .....

b For any amount included in line 17 that was received from a nondisqualified person, attach a list to show the name of, and amount received for each year, that was more than the **larger** of **(1)** the amount on line 25 for the year or **(2)** $5,000. (Include in the list organizations described in lines 5 through 11, as well as individuals.) After computing the difference between the amount received and the larger amount described in **(1)** or **(2)**, enter the sum of these differences (the excess amounts) for each year:

(1998) ..... (1997) ..... (1996) ..... (1995) .....

c Add: Amounts from column (e) for lines: 15 _____ 16 _____ 17 _____ 20 _____ 21 _____ ▶ 27c 38

d Add: Line 27a total _____ and line 27b total _____ ▶ 27d

e Public support (line 27c total minus line 27d total) ▶ 27e

f Total support for section 509(a)(2) test: Enter amount on line 23, column (e) ▶ 27f

g **Public support percentage (line 27e (numerator) divided by line 27f (denominator))** ▶ 27g %

h **Investment income percentage (line 18, column (e) (numerator) divided by line 27f (denominator))** ▶ 27h %

28 Unusual Grants: For an organization described in line 10, 11, or 12 that received any unusual grants during 1995 through 1998, attach a list (which is not open to public inspection) for each year showing the name of the contributor, the date and amount of the grant, and a brief description of the nature of the grant. Do not include these grants in line 15. (See page 4 of the instructions.)

DONATION AGREEMENT

This donation agreement takes place between Robert DeFreece (Donor) and the Denver & Rio Grande Railway Historical Foundation (Foundation).

Donor wishes to donate a passenger car, more specifically an ex-D.& R.G.W. Dining Car of approximately 70' in length, hereafter referred to as (car). Donor certifies that the car is free and clear of any and all liens and encumbrances. Donor agrees to remove all personal items now currently stored inside the car and leave it in a swept clean status in preparation for movement. Donor understands that the physical relocation of the car to Foundations site will be quite expensive and that the relocation will take place as time and finances permit and may require the storing of said car in it's current location for an unspecified period of time.

In exchange for the donation of the car, the Foundation will issue a receipt for said donation suitable for tax purposes in the amount of TWO THOUSAND FIVE HUNDRED DOLLARS ($2,500.00), and will furnish Donor a Lifetime Membership in the Foundation.

Additionally, Donor understands that the Foundation will be eternally grateful for the donation and will physically memorialize Donor's generosity at the Foundations site. in other words, Thanks a Million !

This Donation Agreement acknowledged this 3rd of June, 1998, by the legal owner of the aforementioned car;

Robert L. DeFreece

Robert DeFreece, Donor

Harriet M DeFreece

This Donation Agreement acknowledged this 8th of June, 1998, on behalf of the Denver & Rio Grande Railway Historical Foundation;

Donald H. Shank, President/Managing Director

To: Don Snoody – Western Heritage
Mike Wright – Cheyenne
Joe Anthofer – Room 830
Jay Gilliam – MC 3300
John Biebel – Cheyenne

Date: September 21, 1998

From: Donald Steele – Room 1000

Subject: Abandonment – Creede Branch – MP 299.3 near Derrick, CO. to 320.9 at Creede, CO.

Find attached letter from Dennis Duffy, dated September 12, 1998, concerning an out of service exemption for the above-mentioned branch.

Our records show no buildings within the limits of this submittal. Following is a list of bridges within the limits of this submittal

MILE POST	TYPE OF BRIDGE	YEAR BUILT	
301.42	14' TST OD	1900	1 sp
306.39	75' TST-OD	1911	5 sp
310.46	40' TST-OD	1900	3 sp
312.72	135' TST-OD	1900	3 sp. steel truss
317.46	180' TST-OD	1900	12 sp
319.97	45' TST-OD	1900	3 span

Mike Wright – As per Mr. Duffy's letter, please arrange to have photographs taken of the above-mentioned bridges and forward pictures and negatives to Joe Anthofer – in Room 830 at Headquarters in Omaha.

Jay Gilliam – Please handle the remaining portions of this submittal, as you have always done.

PHOTOGRAPHY BY

(1-1)

Robert G. Roper

Longmont, Colorado 776-0369

October 12, 1998
1857 Emery St., Apt #3
Longmont, CO 80501

Denver & Rio Grande Railway
Historical Foundation,
1474 Main Ave., #121,
Durango, CO 81301

Attn: Don Shank

Starting the D&RG Railway Foundation is a wonderful and exciting idea and plan. I certainly want to become a part of the organization in any way that I can.

For starters and until I have more information, I am enclosing my check for $35.00 for a family membership.

I would like to note that all future correspondence and the membership card be made to D&RG ROPER as shown on the enclosed card.

I am a avid Railroad Buff and Photographer, and use my family initials to signify my favorite railroad.

I am looking forward to your future success with this venture to preserve Colorado's railroad history.

Sincerely,

Robert G. Roper

Robert G. Roper

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(4)

DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION

A COLORADO NOT-FOR-PROFIT/TAX-EXEMPT CORPORATION

FILE COPY

February 15, 2001

Mr. & Mrs. Dale E. Pizel
P.O. Box 400
Creede, CO 81130

Re: New right-of-way Lease

Dear Mr. and Mrs. Pizel:

On May 24, 2000, the Denver & Rio Grande Railway Historical Foundation (DRGHF) consummated the purchase of the right-of-way from South Fork (Derrick) through the City of Creede. The rear of your commercial building in Creede occupies a portion of right-of-way owned by DRGHF. As legal successor to the Union Pacific Railroad, all portions of our right-of-way will be accounted for and Leases generated accordingly.

Therefore, accompanying this letter please find your new Lease, in duplicate copies. The rental amount has increased modestly in comparison to the dramatic increase in property values.

If it is your desire to continue to occupy right-of-way of the DRGHF, please execute both copies of the Lease documents, initial each page, return both copies for our execution and please include your check for the annualized amount within thirty (30) days upon receipt of this notice. We will forward a fully executed original to you for your records.

If your preference is to terminate your occupancy, please do so within the same thirty (30) day period and make arrangements to vacate our right-of-way in accordance with the terms and conditions as agreed to within your previous Lease.

Thank you in advance for your prompt attention.

Sincerely,

Donald Shank
President, DRGHF

enclosure/ 2 copies lease document

FOUNDATION OFFICE: 1474 MAIN AVENUE, SUITE 223, DURANGO, CO 81301
TEL: 970.259.9498 FAX: 259.0202 E-mail: drghf@frontier.net

BEFORE THE
SURFACE TRANSPORTATION BOARD

UNION PACIFIC RAILROAD COMPANY -- ABANDONMENT EXEMPTION -- IN RIO GRANDE AND MINERAL COUNTIES, CO (CREEDE BRANCH BETWEEN DERRICK AND CREEDE)	))))))	DOCKET NO. AB-33 (SUB-NO. 132X)

**PETITION FOR LEAVE TO FILE
OFFER OF FINANCIAL ASSISTANCE OUT OF TIME
AND TENDERED OFFER OF FINANCIAL ASSISTANCE**

THE DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION (the Foundation) hereby (1) petitions for leave to file its Offer of Financial Assistance (OFA) two days out-of-time; and (2) tenders its OFA for purchase of the rail line for $387,930.

PETITION FOR LEAVE TO FILE OFA OUT-OF-TIME

By decision served March 30, 1999, the Board extended the date for filing of the Foundation's OFA to March 31, 1999. Despite the Foundation's best efforts, it was unable to finalize financial statements for the Foundation and for Mr. Donald H. Shank (Mr. Shank) until April 2, 1999, two days after that extended filing date.

The Board is respectfully urged to accept the Foundation's OFA for filing out-of-time. The rationale of the decision served March 30, 1999 supports such acceptance. UP would not be prejudiced by that action. The effective date of the exemption for abandonment already is postponed as a result of the filing and acceptance of another OFA. Moreover, if the Foundation's OFA is accepted for filing, UP will have a choice of offerors with which to negotiate.

The Foundation very much appreciates the Board's indulgence in having extended the OFA filing date and asks for the Board's further indulgence in accepting the Foundation's filing two days out-of-time.

OFFER OF FINANCIAL ASSISTANCE

Explanation of Disparity between Amount Offered and UP's Valuation

The amount offered by the Foundation, $387,930 is disparate from UP's valuation of $778,616. Pursuant to 49 U.S.C. § 10904(c), the Foundation submits the following in explanation of the basis for that disparity and the manner in which its offer is calculated.

Based on a preliminary valuation of the parcels of the right-of-way held in fee, appropriately adjusted to take into account shape and size, lack of access, lack of utilities and other improvements and the like, as well as costs to arrive at net value, the Foundation values the real estate at $319,314, as shown below:

Segment No.	Acres in Fee	Value Per Acre	Total Segment Value
1	14.4	$ 4,320	$ 61,085
3	8.6	$ 2,000	$ 17,200
6	22.73	$ 2,500	$ 56,825
7	84.42	$ 2,182	$ 184,204
		Total Overall Value	$ 319,314

The Foundation accepts UP's valuation of track materials of $68,616. The resulting total net liquidation value is $387,930 ($319,314 + $68,616).

Financial Responsibility

Attached to the pleading as Appendix 1 is a copy of a Statement of Financial Condition for the Foundation as of November 30, 1998. The Foundation's current financial condition is substantially the same as reflected in Appendix 1. As reflected in Appendix 1, the Foundation has cash available for purchase of the rail line in the amount of approximately $23,000.

Attached to this pleading as Appendix 2 is a copy of a pledge to the Foundation in the amount of $400,000 executed by Mr. Shank on March 30, 1999. The amount pledged by Mr. Shank is to be used by the Foundation for acquisition of the rail line, as stated in the pledge.

Mr. Shank is President, Board Chairman, incorporator and founder of the Foundation in early 1997. Attached to this pleading as Appendix 3 is a copy of Statement of Financial Condition of Mr. Shank as of March 15, 1999. Mr. Shank's current financial condition is substantially the same as reflected in Appendix 3. Reference is made to the Addendum to that Statement (p. 4). As reflected therein, Mr. Shank currently has sufficient liquid assets to make good on his pledge to the Foundation. There is current equity of $433,000 in Mr. Shank's residence, which is available for equity financing. In addition, Mr. Shank has approximately $18,700 in cash and equivalents and $87,500 in liquid investments. By July, 1999, Mr. Shank will realize net proceeds of approximately $570,561 from current investments ($320,850 + $249,711). Those funds would be available to Mr. Shank for his pledge to the Foundation before the likely closing date of purchase of the rail line from UP (90 days usually are allowed for closing from the date that the price is determined).

Based on Mr. Shank's pledge to the Foundation and Mr. Shank's financial condition, the Foundation would be able to pay the probable purchase price for the line and operate it for at least

two years. In the latter respect, the Colorado Department of Transportation has stated to the Foundation that it would provide a grant of $1 million to the Foundation for rehabilitation of the line in the event that the Foundation acquires it.

Intended Use of the Rail Line

The Foundation intends to acquire the rail line for rail freight and passenger use. The Foundation is ready, willing and able to handle rail freight traffic. The Foundation would actively seek to develop rail freight traffic to and from the line. In addition, the Foundation intends to operate passenger-tourist rail service.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, the Board should:

(1) accept the Foundation's OFA for filing two days out-of-time; and

(2) find that the Foundation is a financially responsible person who has offered financial assistance regarding the rail line.

Respectfully submitted,

DENVER & RIO GRANDE RAILWAY
HISTORICAL FOUNDATION
1474 Main Avenue, #121
Durango, CO 81301

Offeror

Thomas F. McFarland Jr.

THOMAS F. McFARLAND, JR.
McFARLAND & HERMAN
20 North Wacker Drive, Suite 1330
Chicago, IL 60606-2902
(312) 236-0204

Attorney for Offeror

Date Filed: April 2, 1999

DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION

A COLORADO NON-PROFIT / TAX EXEMPT CORPORATION

STATEMENT OF FINANCIAL CONDITION

(UNAUDITED)

AS OF

NOVEMBER 30, 1998

Foundation Office: 1474 Main Avenue, Suite 121, Durango, CO 81301
Tel: 970-259-9498 Fax: 970-259-0095

Appendix 1
(3 pages)

DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION

Statement of Financial Condition
(Unaudited)

November 30, 1998

ASSETS

CASH AND CASH EQUIVALENTS		
Norwest Bank-Durango Gen. Acct. #649-8008785	$	22,585.32
Norwest Bank-Durango Project 0518 #649-8009723		608.75
Total Cash and Cash Equivalents		23,194.07
RAILROAD EQUIPMENT - ROLLING STOCK		
1880 D&RG Narrow Gauge Caboose #0518		5,000.00
1890 D&RG Standard Gauge Dining Car		10,000.00
1903 D&RG Narrow Gauge Box Car #3016		3,000.00
1903 D&RG Narrow Gauge Box Car #3585		3,000.00
1881 RGS Narrow Gauge Passenger Coach #252		10,000.00
1880 D&RG Narrow Gauge Passenger Coach #274		7,500.00
1883 D&RG Narrow Gauge Pullman Car #251		10,000.00
Total Railroad Equipment - Rolling Stock		48,500.00
RAILROAD MEMORABILIA AND ARTIFACTS (Condensed)		
Lantern Collection - Numerous Railroads		17,000.00
Photographic and 8 mm Movie Collection		12,000.00
Historic Paperwork Collection		14,500.00
Associated Artifacts - Switch stands, rail, spikes, car seals, etc.		21,500.00
Total Railroad Memorabilia & Artifacts		65,000.00
MODEL RAILROAD COLLECTIONS		
Lionel Train Collection		55,000.00
American Flyer Collection		35,000.00
Sn3, N scale, and misc.		62,000.00
Total Model Railroad Collections		152,000.00
OTHER ASSETS		
Land - 7.375 acres Silverton, CO - Donated for Cash Conversion		35,000.00
Total Other Assets		35,000.00
TOTAL ASSETS	$	323,694.07

DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION

Statement of Financial Condition
(Unaudited)

November 30, 1998

LIABILITIES AND NET WORTH

LIABILITIES	
Accounts Payable	$ -0-
Contracts Payable	
Annualized Office Lease - Durango @ $325.00/month	3,900.00
Total Accounts and Contract Payable	3,900.00
TOTAL LIABILITIES	3,900.00
NET WORTH	319,794.07
TOTAL LIABILITIES AND NET WORTH	323,694.07

Donald H. Shank

1474 Main Avenue, Suite 121, Durango, CO 81301 Tel. 970.259.9498 Fax 259.0895

April 2, 1999

To: Board of Directors
Denver & Rio Grande Railway Historical Foundation

From: Donald H. Shank

Gentlemen: I, Donald H. Shank, do hereby pledge a donation to the D&RG Rwy Historical Foundation in the amount of FOUR HUNDRED THOUSAND DOLLARS, ($400,000.00) to be utilized for the acquisition of the Derrick - Creede right-of-way currently owned by the Union Pacific Railroad Company. The "Creede Branch" is listed with the Surface Transportation Board (STB) by Docket No. AB-33 (Sub-No. 132X) and includes 21.6 miles of right-of-way and track material.

Respectfully submitted this 30th day of March, 1999.

Donald H. Shank

Appendix 2

DONALD H. SHANK

STATEMENT OF FINANCIAL CONDITION
(Unaudited)
as of
MARCH 15, 1999

ASSETS	
CASH AND CASH EQUIVALENTS	
Bank of Durango - Checking #407119	9,200
1st Nat'l Bank of Durango - Ckg #408921	8,000
U.S. Savings Bonds	1,500
Total Cash and Cash Equivalents	18,700
NOTES AND LOANS RECEIVABLE	
Second Trust Deed Receivable	145,000
Other Loans Receivable	5,400
Total Notes and Loans Receivable	150,400
INVESTMENTS	
Investment with Jeffery Matz, Esq. Phoenix, AZ	
Principal amount	100,000
Profits earned as of 3-20-99, available 4-1-99	87,500
Stock in privately held corporations:	
Lectin Biotech, 100% Ownership	5,000
Nordyke Pharmaceutical, 100% Ownership	5,000
Borrasca Land & Development, 50% Owner	125,000
Land/Business:	
The Mortgage Station L.L.C., 50%(w/wife)	40,000
Air Park Village, L.L.C.,50% Ownership	250,000
22.66 acres, Hwy 160 East 100% Owner	450,000
Total Investments	1,062,500
OTHER ASSETS	
Personal Residence, 6214 Watertree Ct. Agoura, CA (jointly)	495,000
Autos, 95 Ford Explorer	18,000
Personal Furnishings, Rare Art, Ancient and Modern Coins	213,000
Total Other Assets	726,000
TOTAL ASSETS	$1,957,600

1-29

LAW DEPT.

MAR 1 1 1999

REC'D URRB 10-Mar-99

NET LIQUIDATION VALUE OF TRACK & BRIDGES
Creede Branch (M.P. 299.30 - M.P. 320.90)

M.P.	299.30	TO	320.90	=	21.60 TRACK MILES
M.P.	0.00	TO	0.00	=	0.00 TRACK MILES
	MISCELLANEOUS SIDINGS			=	1.49 TRACK MILES
					23.09 TOTAL T.M.S

TRACK COMPONENTS -

Rail Weight	RAIL Track Miles	RAIL Net Tons	OTM Net Tons	SWITCHES No. 7	SWITCHES No. 8.5 & No. 9	SWITCHES No. 10	SWITCHES Net Tons	NET TONS		
136#		0.00	0.00				0.00	0.00		
133#		0.00	0.00				0.00	0.00		
132#		0.00	0.00				0.00	0.00		
131#		0.00	0.00				0.00	0.00		
119#		0.00	0.00				0.00	0.00		
115#	0.04	8.10	2.45				0.00	10.55		
112#		0.00	0.00				0.00	0.00		
110#		0.00	0.00				0.00	0.00		
100#		0.00	0.00				0.00	0.00		
90#	2.51	397.58	98.14				0.00	495.72		
85#		0.00	0.00				0.00	0.00		
80#		0.00	0.00				0.00	0.00		
65#	20.54	2530.53	592.41		9		21.02	3143.96		
Total:	23.09	2936.21	693.00				21.02	3650.23		

TIES		
SWITCH TIES	477	EA
CROSS TIES	62521	EA
TOTAL TIES	62998	EA

VALUE OF TRACK COMPONENTS							CURRENT MARKET VALUE	DRI RATE	BASE YEAR VALUE
MAIN & SIDE TRACKS:	318.07	N.T. x	$109.00	/N.T. =	$34,669	Reroll Rail		0.994	$34,461
MAIN & SIDE TRACKS:	2,610.04	N.T. x	$90.00	/N.T. =	$234,904	Scrap Rail		0.994	$233,495
MAIN & SIDE TRACKS:	8.10	N.T. x	$250.00	/N.T. =	$2,024	No 2 Qual Rail		0.994	$2,012
O.T.M. & TURNOUTS:	714.02	N.T. x	$125.00	/N.T. =	$89,253	Scrap Material		0.994	$88,717
SWITCH & CROSS TIES :	0	ea. x	$6.00	ea. =	$0	Reusable Ties		0.994	$0
SWITCH & CROSS TIES :	3,150	ea. x	$4.00	ea. =	$12,600	Landscape Ties		0.994	$12,524
SWITCH & CROSS TIES :	59,848	ea. x	$0.00	ea. =	$0	Scrap Ties			$0
TOTAL TRACK VALUE							$373,450		$371,209
BRIDGE VALUE							$2,887	0.994	$2,870
TOTAL VALUE							$376,337		$374,079

REMOVAL COSTS								
TRACK REMOVAL	23.09	T.M.s @	$7,155	Per Mile	$165,209		0.99	$163,557
SWITCH & CROSSTIES	62998	Ea. @	$1.25	Ea.	$78,748		0.99	$77,960
BRIDGE REMOVAL COSTS					$52,012		0.99	$51,492
RD CROSSING REMOV	981	Ft. @	$65.00	Per T.F.	$63,765		0.99	$63,127
TOTAL REMOVAL					$307,721			$304,644
NET LIQUIDATION VALUE					$68,616			$69,435
Value of Material Railroad will retain					$2,024		0.994	$2,012
Labor associated with Material retained by Railroad					$129		0.99	$128

NIvcreed.xls

STATE OF COLORADO PRINTED IN WHITE INK MUST APPEAR IN THE SPACE ABOVE THIS BORDER

STATE OF COLORADO
OFFICE OF THE STATE CONTROLLER

Warrant No. 00048165060

WARRANT
ON THE TREASURER OF THE STATE OF COLORADO

PAYABLE THROUGH ANY FINANCIAL INSTITUTION

MONTH DAY YEAR
08 19 99

VOID AFTER 6 MONTHS FROM ISSUE DATE

DOLLARS	CENTS
$******1,994	00

Large to:
631 STATE HISTORICAL SOCIETY

PAY TO THE ORDER OF

DENVER & RIO GRANDE RAILWAY HISTORI

1474 MAIN AVENUE SUITE 121
DURANGO CO 81301

Arthur J. Barnhart
STATE CONTROLLER

Mike Coffman
STATE TREASURER

OUT OF MONIES NOT OTHERWISE APPROPRIATED

"00048165060" :102100918: 606 8004749"

nt No. 00048165060 STATE OF COLORADO

VOUCHER	DESCRIPTION	INVOICE NO.	INV. DATE	NET
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			NET	1.99400

(1)

ATTORNEY GENERAL OF COLORADO
Ken Salazar

September 19, 2000

Stephen Wardell, Chairman
Rodney Wintz
Karl Kolisch
Mineral County Commissioners
P.O. Box 70
Creede, CO 81130

Honorable B. J. Myers
Mayor of Creede
P.O. Box 457
Creede, CO 81130

Mr. Don Shank, President
Denver & Rio Grande Railway Historical Foundation
1474 Main Avenue, Suite 223
Durango, CO 81301

Re: Creede Railroad Right-of-Way Dispute

Dear Mayor Myers, Commissioners and Mr. Shank:

On September 8 in Creede I spoke with Mayor Myers and other Creede and Mineral County officials about issues relating to Don Shank's efforts to establish a tourist railroad on the existing railroad right-of-way from South Fork into Creede. I informed you that I would look into the issues. After having met with attorneys in my office and Charles Bedford, the Director of the State Land Board, I make the following observations that might be helpful to you as you address the issues of the railroad:

1. It is true that the State Land Board right-of-way instrument includes language that states that the right-of-way will terminate automatically if the right-of-way is not used for railroad purposes for twelve consecutive months. I understand that this rail line has not been used for railroad purposes for some 27 years. Therefore, based on the literal reading of the State Land Board right-of-way, the railroad's right to use this land would have terminated a long time ago due to non-use for railroad purposes.

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State Services Building - 1525 Sherman Street-5th Floor • Denver, Colorado 80203
Phone (303) 866-3557 • FAX (303) 866-4745

2. A question exists as to the interface of federal law concerning railroads with the authority of the State Land Board to enforce such termination provisions in its right-of-way documents. That issue may ultimately some day have to be resolved in court. My position as Attorney General would be to argue that the terms of the State's right-of-way documents are enforceable and are not abrogated by any federal authority.

3. Even if federal authority would preempt State authority concerning termination of the right-of-way (which the State would not concede), whatever rights, if any, Mr. Shank has acquired from the Union Pacific Railroad do not give Mr. Shank the authority to control the use of land within the right-of-way with respect to any non-railroad purpose, except as absolutely necessary for railroad operations. In other words, Mr. Shank has no right or authority under the law to limit any use of the surface lands or mineral rights within or under the right-of-way unless such use is entirely inconsistent and incompatible with legitimate railroad operations. The right to control the use of the land remains an exclusive right within the State of Colorado which, acting through the State Land Board, is the owner of the fee over which the right-of-way has been defined.

4. To the extent that Mr. Shank would attempt to collect remuneration from any user of property within the right-of-way, he is acting outside of any legal authority that we are able to identify.

5. I had thought that possibly arranging for a meeting among the local governments in Mineral County and Mr. Shank might lead to a resolution of these matters. However, I do not believe that we would be able to move this matter any further toward resolution because of the polarized position of the parties.

6. I recognize the difficulty that small communities like Creede and Mineral County have in dealing with such complicated legal disputes. I would hope that an easier and amicable resolution could be achieved. Perhaps a starting point would be to commission a comprehensive survey and title search of lands located in the disputed area.

If you have any questions, please call Patrick Wilson of my office at 303-866-5071.

Sincerely,

Ken Salazar

KEN SALAZAR
Attorney General
(303) 866-3557
(303) 866-4745 (FAX)

cc: Greg Walcher
Charles Bedford
Patrick Wilson
Merle Knous

DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION

A COLORADO NOT-FOR-PROFIT/TAX-EXEMPT CORPORATION

FILE COPY

October 31, 2000

SENT VIA U.S. EXPRESS MAIL, RETURN RECEIPT REQUESTED

Ms. Lindsay Fox
General Delivery
Creede, CO 81130

Re: Production of Financial Documents per request

Dear Ms. Fox:

Pursuant to your request for production of documents pertaining to the Denver & Rio Grande Railway Historical Foundation, you will find the enclosed copy of our Form 1023, Application for Recognition of Exemption, as filed with IRS. You are already in possession of the approval letter notifying our Foundation of its approval under Section Code 501(c)(3).

Under IRS Section Code 508 (c)(1), Regulation SS 1.508-1(a)(3), revised PRC 83-23, exempt organizations are not required to file Form 990 (Return of Organization Exempt From Income Tax), if their gross receipts are not greater than $25,000. As our Foundation only formed during mid-1997, received its exempt status in 1998, and did not exceed $25,000 in gross receipts during either of those two years, we were not required to file. Gross receipts for the fiscal year 1999 were well over the $25,000 figure thus requiring our filing of Form 990.

Due to an unexpected serious traffic accident in which a pick-up truck carrying seven individuals lost control and crashed directly into the office our Foundation occupied, killing the driver and sending the rest to the hospital, some of the financial records were either destroyed and/or inadvertently thrown away with the accident debris. Fortunately, the accident occurred while the office was closed and I was out of town. During the apparent chaos, the mess in the office was simply scooped-up and discarded as it contained dirt, snow, vast amounts of shattered glass, wood, drywall, and our demolished file cabinet containing records.

Upon my return, I was faced with the grim appearance of an office that resembled a war zone and this was after the office had been "cleaned up". This situation and the potential for a repeat motivated our Foundation to relocate our offices to a different suite, upstairs, within the same building. We are in Suite 223, as opposed to 121, directly facing Main Avenue.

This incident is a matter of police/public record. The confusion caused great difficulty and delay in the compilation of information for our timely filing of Form 990.

FOUNDATION OFFICE: 1474 MAIN AVENUE, SUITE 223, DURANGO, CO 81301
TEL: 970.259.9498 FAX: 259.0202 E-mail: drghf@frontier.net

The re-creation and preparation of our financial records and our return is now nearly complete and will be forwarded to both IRS and you very soon. IRS has been made aware of this situation and we trust that you will be equally as understanding. In the event that you are not, we will be happy to furnish you with our most recent P&L and Balance Sheet for your perusal.

Thank you for your interest in our Foundation. I hope the documents will satisfy your curiosity and encourage you to become a supporter in our effort to preserve Colorado's important railroad heritage. I do, however, suspect that your support will be highly unlikely.

In closing, you were quite prompt in filing your complaint with IRS regarding our timely production of documents. This came as no surprise to us given the statement in your cover letter requesting documents, that you were not simply trying to perpetuate the animosity you have towards our charitable foundation. Perhaps it would be appropriate for our Foundation to notify IRS of your upcoming court trial to answer charges of Criminal Mischief against our Foundation during the recent destruction of the Foundation's private property. Upon the presentation of our completed 1999 Form 990 to you, and should you continue to pursue additional information beyond that point, our Foundation may elect to contact the IRS District Director for determination of your actions as constituting a harassment campaign.

Sincerely,

Donald Shank
Executive Director, D&RGHF

enclosure/ · Form 1023, Application for Recognition of Exemption

cc: Department of the Treasury, Internal Revenue Service

DISTRICT COURT, COUNTY OF MINERAL, STATE OF COLORADO

Case No. 00-CV- 4

Filed in the Combined Court
Mineral County, Colorado

CITY OF CREEDE, a Colorado Municipal Corporation,

NOV 7 2000

Plaintiff,

Margaret A. Wardell
Clerk of the Combined Court

-vs-

DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION, a Colorado Not-For-Profit Corporation and DONALD H. SHANK,

Defendants.

Plaintiff, by its attorneys, George M. Allen and W. Randolph Barnhart, states:

Summary of the Action

Since 1972, the City of Creede has had in force a residential zoning regime which relates to property as to which the Denver & Rio Grande Railway Historical Foundation (the "Foundation") and its President, Donald H. Shank, now claim to have a right to develop commercial and business activities. Mr. Shank, acting on behalf of the Foundation he heads and for which he solicits contributions, has carried out numerous overt acts, including the erection of signs and barricades, the publication of public notices and initiation of criminal prosecutions and the issuance of "Notices to Vacate," to launch commercial and business activities on residential property lying within the City of Creede. The Foundation's activities have had the disruptive effect of causing uncertainty and instability in Creede. Because the fundraising solicitations carried out by Mr. Shank and the Foundation contain representations regarding prospective future use of residential property in Creede for business and commercial purposes, they may implicate the City of Creede in potentially actionable misrepresentations and/or for unlawful takings for which the City may not have sovereign immunity, thus exposing the City of Creede to potential liability to third parties on account of misrepresentations with respect to land use in violation of Creede's zoning and land use controls.

In this action, the City of Creede seeks a declaratory judgment that its residential zoning is applicable to those lands purportedly subject to use by the Foundation but for which the Foundation

has no direct railroad or railroad freight use.[1] The City of Creede may also seek such temporary, preliminary or permanent injunctive relief as may be necessary to enforce its zoning and land use controls.

Parties, Venue and Jurisdiction

1. The parties to this action are:

   A. The Plaintiff is the City of Creede, a Colorado Town, a Colorado Municipal corporation.

   B. The Denver & Rio Grande Railway Historical Foundation (the "Foundation"), a Colorado Not-For-Profit Corporation, is a defendant.

   C. Donald H. Shank, the President of the Foundation, is a defendant.

2. This Court has jurisdiction of this action pursuant to Article VI, Section 9(1) of the Constitution of the State of Colorado, vesting general jurisdiction of civil matters in the District Courts of the State. Jurisdiction of this Court is further invoked pursuant to C.R.S. §13-51-101, *et seq.*, the Uniform Declaratory Judgments Law and Rule 57 of the Colorado Rules of Civil Procedure.

3. Venue is proper in this County and District pursuant to Rule 98(a) of the Colorado Rules of Civil Procedure, as this is an action affecting application of Creede's zoning to property lying within this County.

General Averments

4. In 1972, Creede enacted a zoning regime by which certain real property lying within that part of Creede known as "South Creede" was zoned residential. South Creede continues to be zoned residential.

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[1] *The City of Creede does not, in this action, seek any declaratory or injunctive relief with respect to the grant of rights to carry out railroad freight made to the Foundation by the United States Surface Transportation Board.*

5. The Surface Transportation Board of the United States ("STB") has authorized Defendant Foundation to provide freight rail service within Mineral County, pursuant to the Foundation's Offer of Financial Assistance filed with the STB.

6. In connection with the authorization for conduct of freight rail service, the Defendant Foundation and its principal officer, Defendant Shank, have carried out numerous overt acts to develop and take possession of certain land in South Creede for non-freight railroad related activities. Those acts have included but not been limited to the following:

   A. Erection of signs and barricades limiting or purporting to limit ingress and egress to the non-railroad-related land in South Creede.

   B. Instigation of criminal proceedings against persons claimed to have trespassed or interfered with Defendant's activities on non-railroad-related land in South Creede;

   C. Issuance of news statements and releases declaring an intent to carry out commercial and business activities on non-railroad-related land in South Creede;

   D. Issuance, on August 4, 2000, of "Notices to Vacate" to occupants of non-railroad-related land;

   E. Solicitation of contributions to the Foundation, by means of the Internet, United States mails, interstate and intrastate wire communication, including telephone calls, facsimile transmissions and data transmissions and other means of communication, to obtain financing in relation to the Foundation's declared intent to carry out non-railroad-related activities on non-railroad-related land in South Creede, in which the Defendants have declared and published representations that they have a right to carry out commercial and business activities on non-railroad-related land in South Creede.

7. Creede has zoned the land at issue in this suit, lying in South Creede, as residential property. The prospective business and commercial use of non-railroad-related land, declared to be carried out by Defendants, does violate and will continue to violate Creede's zoning and land use laws and ordinances.

8. Defendants' widely publicized intent to use non-railroad-related land in South Creede for non-freight railroad related commercial and business purposes has created disruption and uncertainty within financial and real estate markets, tending to jeopardize the integrity and viability of Creede's land use and zoning regimes as applied to South Creede and tending to create circumstances in which third parties may reasonably draw the conclusion Creede's land use and zoning regimes are either not be enforced or have been waived or rescinded as to Defendants' activities in South Creede.

9. Creede has no adequate or effective means of protection of the integrity and viability of its land use and zoning regimes, as applied to non-railroad-related land use of land on which Defendants may have certain use rights (for railroad freight activities) in South Creede other than this action.

10. Creede has no effective, speedy or adequate remedy at law for the damages to Creede and its citizens and the irreparable harm which has been and is being caused by Defendants other than the declaratory judgment and possible injunctive relief sought in this action.

Cause of Action

11. Paragraphs 1 through 10 are incorporated herein by reference.

12. This Court should enter a declaratory judgment, pursuant to C.R.S. §13-15-101, *et seq.* and Rule 57 of the Colorado Rules of Civil Procedure, declaring the following:

That Creede's 1972 residential zoning is in full force and effect with respect to that land in South Creede as to which Defendant Foundation claims to have certain rights to carry out freight railroad activities, with regard to all land in South Creede as to which no freight railroad activities or activities directly related to freight railroad activities are being carried on. The Declaratory Judgment should specifically state that with respect to all lands in South Creede not directly used for freight railroad activity, Creede's residential zoning, enacted in 1972, is in full force and effect and that Defendants have no right to carry out any activity or make any third-party commercial speech representation that they have any right, claim or basis to carry out non-freight railroad related activities on such land.

Prayer for Relief

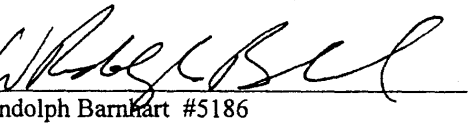
WHEREFORE, Plaintiff prays that this Court enter judgment as set forth in paragraph 12 above, together with such other and further relief as the Court deems appropriate, including Plaintiff's cost of this action.

Dated this 2nd day of November, 2000.

Respectfully submitted,

George M. Allen #2080
P.O. Box 66; 145 Payson Street
Naturita CO 81422
Telephone: 970-865-2800
Facsimile: 970-865-2808
E-Mail: alnoma@yahoo.com

HILLYARD & BARNHART, L.L.P.

By: 
W. Randolph Barnhart #5186
7887 East Belleview Ave., Ste. 1200
Englewood CO 80111
Telephone: 303-793-0700
Facsimile: 303-793-1950
E-Mail: rbarnhart@hblegal.com

COUNSEL FOR PLAINTIFF

DISTRICT COURT COUNTY OF MINERAL, COLORADO 201 No. Main Street Creede, CO 81130 CITY OF CREEDE, a Colorado Municipal Corporation, Plaintiff, vs. DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION, a Colorado Not-For-Profit Corporation and DONALD H. SHANK, Defendants. Raymond P. Micklewright Wolf & Slatkin, P.C. 44 Cook Street, Suite 1000 Denver, CO 80206-5827 Telephone: (303) 355-2999 Atty. Reg. #: 13009	▲ COURT USE ONLY ▲ Case No. 00-CV-4 Division /Courtroom:
ANSWER	

Comes now the defendants, Denver & Rio Grande Railway Historical Foundation and Donald H. Shank (the "Defendants"), by their undersigned attorneys, and for their Answer state:

1. Defendants admit the allegations of paragraph 1 of the Complaint.

2. Defendants deny that this Court has jurisdiction over this action pursuant to the provisions of law cited in paragraph 2 of the Complaint or any other provisions of Colorado law. This action presents a Federal question. Defendants will take steps to remove this matter to Federal Court.

3. Defendants deny the allegations of paragraph 3 of the Complaint inasmuch as venue cannot be proper in this Court when this Court lacks jurisdiction over this action.

FEB-15-2001 THU 07:59 AM HILLYARD&BARNHARTLLP FAX NO. P. 01

4. Defendants are without sufficient information to admit or deny the allegations of paragraph 4 of the Complaint, and therefore demand strict proof thereof.

5. Defendants admit the allegations of paragraph 5 of the Complaint.

6. With respect to the allegations of paragraph 6 of the Complaint, Defendants deny that they have carried out acts to develop and take possession of land in Creede, Colorado "for non-freight railroad related activities."

A. Defendants admit the allegations of paragraph 6A of the Complaint except that Defendants deny that the land referred to is "non-railroad-related land".

B. Defendants admit the allegations of paragraph 6B of the Complaint except that Defendants deny that the land referred to is "non-railroad-related land".

C. Defendants are without knowledge sufficient to admit or deny the allegations of paragraph 6C of the Complaint, and therefore demand strict proof thereof.

D. Defendants admit the allegations of paragraph 6D of the Complaint except that Defendants deny that the land referred to is "non-railroad-related land".

E. Defendants admit the allegations of paragraph 6E of the Complaint except that Defendants deny that they intend to carry out, or have declared that they have the right to carry out, "non-railroad-related activities" on "non-railroad-related land" in Creede.

7. With respect to the allegations of paragraph 7 of the Complaint, Defendants are without knowledge sufficient to admit or deny that Creede has zoned land as residential property, and therefore demand strict proof thereof; Defendants deny that they have declared a prospective business and commercial use of "non-railroad-related land" in Creede; Defendants deny that their prospective use of land would violate Creede's zoning and land use laws and ordinances.

8. With respect to the allegations of paragraph 8 of the Complaint, Defendants deny that they intend to use "non-railroad-related land" for "non-freight railroad related commercial and business purposes"; Defendants are without knowledge sufficient to admit or deny the remaining allegations, and therefore demand strict proof thereof.

9. Defendants deny the allegations of paragraph 9 of the Complaint.

10. Defendants deny the allegations of paragraph 10 of the Complaint.

FEB-15-2001 THU 08:00 AM HILLYARD&BARNHARTLLP FAX NO. P. 02

11. No further answer is required as to paragraph 11 of the Complaint which seeks to incorporate paragraphs 1 through 10 by reference.

12. Defendants deny the allegations of paragraph 12 of the Complaint inasmuch as this Court lacks jurisdiction to enter the declaratory judgment requested, and entry of such a judgment would not be warranted even if the Court had the requisite jurisdiction.

AFFIRMATIVE DEFENSE

A. Local zoning and land use laws cannot be lawfully applied in a manner that would result in a diminution of the width of Defendants' railroad right-of-way inasmuch as the full width of railroad right-of-way is presumed to be necessary for the legitimate purposes of the railroad.

WHEREFORE, Defendants Denver & Rio Grande Railway Historical Foundation and Donald H. Shank request that the Complaint be dismissed. Defendants should be awarded their costs in this matter and all other relief to which they may be entitled.

Respectfully submitted,

WOLF & SLATKIN
Professional Corporation

By RP Micklewright

Raymond P. Micklewright, #13009
Attorneys for Defendants
44 Cook Street, Suite 1000
Denver, CO 80206-5827
(303) 329-6826

FEB-15-2001 THU 08:00 AM HILLYARD&BARNHARTLLP FAX NO. P. 03

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Answer were served, this 13th day of February, 2001, by placing the same in the U.S. Mail, postage prepaid, and addressed to the following:

Thomas F. McFarland, Jr., Esq.
McFarland & Herman
20 North Wacker Drive, Suite 1330
Chicago, IL 60606-2902

George M. Allen 2080
206-A Society Drive
Telluride, CO 81435

W. Randolph Barnhart, Esq.
Hillyard & Barnhart
7887 E. Belleview Ave., Suite 1200
Englewood, CO 80111

June E. Nevills

FEB-15-2001 THU 08:00 AM HILLYARD&BARNHARTLLP FAX NO. P. 04

DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION

A COLORADO NOT-FOR-PROFIT/TAX-EXEMPT CORPORATION

February 15, 2001

Ms. Louis E. Gray
Creede, CO 81130

Re: New right-of-way Lease

Dear Ms. Gray:

On May 24, 2000, the Denver & Rio Grande Railway Historical Foundation (DRGHF) consummated the purchase of the right-of-way from South Fork (Derrick) through the City of Creede. Your garage in Creede occupies a portion of right-of-way owned by DRGHF. As legal successor to the Union Pacific Railroad, all portions of our right-of-way will be accounted for and Leases generated accordingly.

Therefore, accompanying this letter please find your new Lease, in duplicate copies. The rental amount has increased only slightly in comparison to your previous Lease and as compared to the dramatic increase in property values. In fact your new Lease represents our minimum annual amount for any Lease of railroad property.

If it is your desire to continue to occupy right-of-way of the DRGHF, please execute both copies of the Lease documents, initial each page, return both copies for our execution and please include your check for the annualized amount within thirty (30) days upon receipt of this notice. We will forward a fully executed original to you for your records.

If your preference is to terminate your occupancy, please do so within the same thirty (30) day period and make arrangements to vacate our right-of-way in accordance with the terms and conditions agree to within your previous Lease.

Thank you in advance for your prompt attention.

Sincerely,

Donald Shank
President, DRGHF

enclosure/ 2 copies lease document

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FOUNDATION OFFICE: 1474 MAIN AVENUE, SUITE 223, DURANGO, CO 81301
TEL: 970.259.9498 FAX: 259.0202 E-mail: drghf@frontier.net

RIGHT-OF-WAY LEASE

THIS LEASE ("Lease") is entered into on the 15th day of February 2001 between DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION, a Colorado corporation ("Lessor") and Louise E. Gray, an individual as ("Lessee").

Lease No. 200105 Mile Post: 320+4486'

PART 1
BASIC LEASE TERMS

A. PREMISES

The term "Premises" shall refer to the land and any improvements and facilities located thereon, at or near Creede, County of Mineral, State of Colorado, as shown on Drawing No. L-505, January 1, 2001, attached hereto as Exhibit "A" and made a part hereof.

B. EFFECTIVE DATE

This Lease shall take effect on January 1, 2001, ("Effective Date").

C. TERM

This Lease shall be for a term of thirty (30) days ("Lease Term") from Effective Date hereon and shall continue on a month-to-month tenancy basis until terminated hereunder.

D. TERMINATION

This Lease shall be terminable by either party at any time without cause on thirty (30) days' advance written notice to the other.

E. USE

The Premises shall be used by Lessee solely and exclusively for Lessee's garage building, parking area and access area.

F. RENT

Commencing as of the Effective Date hereof, Lessee shall pay to Lessor as rent for the Premises ("Base Rent") the sum of THREE HUNDRED DOLLARS AND NO/100 ($300.00) per annum, payable annually in advance, with the first year's rent to be paid on or before the execution hereof.

G. RENT ADJUSTMENT

Not more than once every twelve (12) months, Lessor may redetermine the rent. In the event Lessor does redetermine the rent, Lessor shall notify Lessee of such change.

H. PROOF OF INSURANCE

On or before the exccution of this Lease, Lessee shall furnish to Lessor proof of insurance as required under Section 14 of the General Lease Terms, and the effective date of insurance coverage shall be no later than the Effective Date of this Lease.

I. ADDRESSES FOR NOTICES

All notices to either Lessor or Lessee shall be addressed as follows:

To Lessor: Denver & Rio Grande Railway Historical Foundation
P.O. Box 1210
South Fork, CO 81154

To Lessee: Louise E. Gray
Creede, CO 81130

K. SUPERSEDES

This Lease supersedes and cancels Lease No. 15960 dated March 4, 1971.

The foregoing Basic Lease Terms and the General Lease Terms set forth in attached Part II are incorporated into and made a part of this Lease.

IN WITNESS WHEREOF, the parties have executed, or have caused to be executed, this Lease in duplicate the day and year first above written.

DENVER & RIO GRANDE RAILWAY
HISTORICAL FOUNDATION

By_____
Title: President & Executive Director

LESSEE:

_____
Louise E. Gray

STATE OF COLORADO)
) ss.
COUNTY OF MINERAL)

The foregoing instrument was acknowledged before me this ___ day of _____ 2001, by Louise E. Gray.

Witness my hand and official seal.

My commission expires: _____.

_____
Notary Public

File Reference: 200105 Date: January 1, 2001

PART II
GENERAL LEASE TERMS

1. PREMISES AND TERM

Lessor hereby leases to Lessee the Premises for the tenancy shown in the Basic Lease Terms, subject to the terms and conditions as set forth in this Lease.

2. USE

Lessee shall not use the Premises for any other than that stated in the Basic Lease Terms, and shall not make any alterations to the Premises except as required for such use. LESSEE SPECIFICALLY ACKNOWLEDGES THAT THIS IS A THIRTY (30) DAY LEASE AND THAT LESSEE HAS NOT RELIED ON ANY REPRESENTATIONS BY ANY AGENT OR EMPLOYEE OF LESSOR TO THE CONTRARY IN MAKING ANY IMPROVEMENTS TO THE PREMISES.

Lessee shall not permit to be placed on the Premises or improvements any signs or notices not solely related to the business of Lessee conducted on the Premises.

Lessee shall not permit any damage, nuisance or waste on the Premises; nor permit to be placed upon the Premises any gasoline, diesel fuel, oil, liquified petroleum gas, or any hazardous or explosive material, waste or substance.

Lessee, at Lessee's expense, shall arrange for the filing of any map required under any subdivision map act and of any environmental impact report required by any governmental body having jurisdiction in the matter.

If any governmental body seeks to impose any condition on approval of Lessee's use of the Premises, Lessor may terminate this Lease forthwith if any condition shall affect any other property of Lessor or shall affect the Premises after this Lease is no longer in effect.

3. CONDITION OF PREMISES

Lessee warrants that it has examined the Premises and accepts the Premises in an "AS IS, WHERE IS" condition, with all faults and with full knowledge of the physical condition, of all zoning and other land use laws and regulations affecting the Premises, and of the conditions, restrictions encumbrances and all matters of record relating to the Premises.

There may be subterranean facilities within the Premises, notwithstanding the absence of markers, monuments or maps indicating their existence.

4. PAYMENT/REFUND OF RENT

Lessee shall pay to Lessor as Base Rent for the Premises the amount specified in Section F of the Basic Lease Terms, payable at the times set forth therein, without deduction, setoff, prior notice or demand. Upon termination of this Lease, unless Lessee is then in default, any unearned portion of any rent paid in advance shall be refunded to Lessee upon Lessee's written demand therefor if made within thirty (30) days after termination.

5. RENTAL REVISION

The Base Rent shall automatically and without notice to Lessee be adjusted, upwards only, on each anniversary date of the Effective Date, in an amount equal to five per cent (5.0%) of the existing Base Rent.

In lieu of the above, Lessor may, at any time, increase the Base Rent without reference to the 5.0% factor by giving Lessee thirty (30) days' notice of such adjustment and its effective date.

The Base Rent, as so increased, shall be effective as of each anniversary of the Effective Date if increased by the 5.0% factor and as of the effective date of any other increase, notwithstanding Lessor's acceptance of a lesser amount and notwithstanding any billing by Lessor for a lesser amount.

6. TAXES AND ASSESSMENTS

A. Lessee shall pay, before they become delinquent, all taxes, charges, and assessments which are levied upon, or which may be locally assessed against,

any improvement or personal property placed upon the Premises by Lessee.

B. In addition to the taxes and assessments specified above, Lessee shall pay to Lessor any privilege, gross income or other tax (not including federal or state income tax) imposed upon the rent received by Lessor by any agency having the authority to do so.

7. UTILITIES

Lessee shall arrange and pay for all utilities, including without limitation, water, power, heat, garbage, communications and sewer services, to be used in connection with this Lease.

If Lessor contracts with a utility company to provide access for service to Lessee at the Premises for Lessee's sole use, Lessee shall pay to Lessor a minimum sum of $500 upon receipt of a bill therefor to partially defray administrative costs.

8. MAINTENANCE AND REPAIR

Lessee, at Lessee's expense and to Lessor's satisfaction, shall keep and maintain the Premises and all improvements thereon in good repair and in a neat and safe condition, and shall promptly make all repairs and replacements that may become necessary to the Premises or improvements thereon, whether structural, ordinary or extraordinary.

9. ALTERATIONS

Lessee shall make no alteration or improvement to the Premises without Lessor's prior written consent. All repairs, alterations and improvements to or on the Premises shall become the property of Lessor, without payment by Lessor of any compensation therefor.

10. LIENS AND CLAIMS

Lessee shall not commence any repairs (except emergency repairs), changes or alterations on the Premises until fifteen (15) days after Lessor has received notice from Lessee stating the date the installation of the alterations is to commerce.

Lessor shall have the right to enter the Premises to post notices of non-responsibility.

Lessee shall fully pay for all materials joined or affixed to the Premises and pay in full all persons who perform labor thereupon. Lessee shall not suffer any mechanic's or materialmen's liens or stop notices or orders of cessation of any kind to be filed against the Premises for any work done or materials furnished at Lessee's request. If any such liens are filed thereon, Lessee shall cause the same to be removed at Lessee's own expense. Should Lessee fail, neglect, or refuse to do so, Lessor shall have the right to pay any amount required to release any such liens, or to defend any action brought thereon, and to pay any judgement entered therein; and Lessee shall be liable to Lessor for all costs, damages, reasonable attorney fees, and any amount expended in defending any proceedings or in the payment of any of said liens or any judgement obtained therefor.

If requested, Lessee, before allowing any work of construction, reconstruction, alteration, or repair upon the Premises, shall give Lessor a bond in a form satisfactory to, and issued by a reliable surety company approved by, Lessor. Such bond shall be in the amount equal to the full contract price of any such work to be done upon the Premises at the request of Lessee and conditioned upon Lessee's paying or causing to be paid all contractors, subcontractors, laborers, operatives, and other persons who may labor or furnish labor, materials, or tools in the performance of such work. Lessor may post and maintain upon the Premises notices of nonresponsibility as provided by law.

11. INDEMNIFICATION

Lessee shall release, defend (with counsel satisfactory to Lessor) and indemnify Lessor from and against all liability, cost and expense for loss of or damage to property and for injuries to or death of any person (including, but not limited to, the property and employees of each party hereto) when arising or resulting from:

(a) the use of the Premises by Lessee, its agents, employees, or invitees;
(b) breach of this Lease by Lessee; or
(c) the location or condition of the Premises or any part thereof;

regardless of whether such liability, cost or expense is caused or contributed to by the negligence, active or passive, of Lessor.

The term "Lessor," as used in this Section 11 and Sections 12, 13 and 14 shall include the successors, assigns and affiliated companies of Lessor, and, if applicable, any other railroad company that may be lawfully operating on Lessor's tracks.

12. COMPLIANCE WITH LAW

Lessee, at Lessee's expense, shall comply with all applicable laws, regulations, rules and orders with respect to the use of the Premises, regardless of when they become or became effective, including, without limitation, those relating to construction, grading, signage, health, safety, noise, environmental protection, waste disposal, and water and air quality, and shall furnish satisfactory evidence of such compliance upon request of Lessor.

Should any discharge, leakage, spillage, emission, or pollution of any type occur upon the Premises due to Lessee's use and occupancy thereof, Lessee, at Lessee's expense, shall clean all property affected thereby, to the satisfaction of Lessor (insofar as the property owned or controlled be Lessor is concerned) and any governmental body having jurisdiction thereover.

Lessee shall indemnify, hold harmless, and defend Lessor from and against all liability, claim, cost or expense (including , without limitation, any fines, penalties, judgments, litigation costs, attorney's fees, and consulting, engineering and construction costs) incurred by Lessor as a result of Lessee's breach of this section, or as a result of any such discharge, leakage, spillage, emission or pollution, regardless of whether such liability, cost or expense arises during or after the Lease Term and regardless of whether such liability, cost or expense is caused or contributed to by the negligence, active or passive, of Lessor.

13. INSURANCE

While this Lease is in effect, Lessee, at Lessee's expense, shall maintain and furnish Lessor evidence of insurance set forth in Lessor's "General Insurance Requirements" attached hereto as Exhibit "B" and made a part hereof.

14. NOISE, SMOKE AND VIBRATION LEVELS

Lessee hereby recognizes and acknowledges that railroad tracks are located on or adjacent to the Premises.

Lessee recognizes that the operation of trains over the tracks does and shall produce noise and smoke or exhaust fume levels which may be considered objectionable by the employees, agents, tenants, or invitees of Lessee. Therefore, Lessee agrees that no legal action or complaint of any kind whatsoever shall be instituted against Lessor on Lessee's behalf as a result of such noise and smoke levels and to indemnify and save harmless Lessor against any loss, damage, liability or expense either might incur as a result of such action being taken by Lessee's employees, agents, tenants or invitees.

Section 14 shall apply during any and all phases of rehabilitation, construction, reconstruction and restoration of Lessor's property contained within or adjacent to the Premises.

15. RESERVATIONS

Lessor hereby excepts and reserves the right, to be exercised by Lessor and by any other who has obtained or may obtain permission or authority from Lessor so to do, to

A. operate, construct, reconstruct, maintain, review and relocate any and all existing pipe, track (if any), power and communication (including without limitation fiber optic) lines and appurtenances and other facilities of like character upon, over or under the surface of the Premises; and

B. construct, operate, maintain, review and relocate such additional facilities of the same character as shall not unreasonably interfere with Lessee's use of the Premises as specified in Section E of the Basic Lease Terms.

Any such construction, operation, relocation or maintenance shall not be done at Lessee's expense unless such work is requested be Lessee or done for the benefit of Lessee.

16. BARRICADES

In addition to any barricades, fences or gates which may be specified elsewhere in this Lease, Lessee, if requested by Lessor, shall install and maintain barricades, fences, and fence gates of a size and form satisfactory to Lessor at such locations as may be designated by Lessor at any time while this Lease is in effect, all at Lessee's expense and to Lessor's satisfaction.

17. SURRENDER OF THE PREMISES

Upon termination of this Lease, Lessee shall leave the Premises in a neat and clean condition satisfactory to Lessor and free of all personal property of Lessee.

Under Section 10 hereof, all repairs, alterations and improvements made by Lessee shall become the property of Lessor. However, Lessor may, by written notice, require Lessee to remove any such alterations and improvements from the Premises and to restore the Premises to their original condition (normal wear and tear excepted) prior to termination of this Lease. If Lessee fails to do so, Lessor may perform such removal and restoration work in which case Lessee shall pay Lessor within thirty (30) days after therefor (1) an amount equal to the rent (as in effect immediately before termination) for the period which such removal is accomplished to compensate Lessor for the loss of rent to Lessor resulting from the unavailability of the Premises for leasing to another tenant during such time and (2) the cost of removal of such improvements. Lessor shall use reasonable diligence in the removal of such improvements.

18. TERMINATION OF LEASE

Termination of this Lease for any reason whatsoever shall not release either party from any liability or obligation hereunder resulting from an event which may have occurred before termination, or thereafter in case by the terms of this Lease it is provided that certain things shall or may have to be done after termination hereof.

19. CONDEMNATION

If all or part of the Premises is acquired be eminent domain or by purchase in lieu thereof, Lessee shall have no claim to any compensation awarded for the taking of the Premises or any part thereof, including Lessee's leasehold interest therein, or to any compensation paid as severance damages, or for loss of or damage to Lessee's improvements.

20. DEFAULT

If Lessee fails to pay the rent or to make any other payment required to ne made by Lessee hereunder within three (3) days after written notice be Lessor or fails to

perform any other term or condition of this Lease within fifteen (15) days after written notice by Lessor or abandons or vacates Premises, then Lessor may, in addition to any other remedies Lessor may have at law or equity, terminate this Lease forthwith.

21. ASSIGNMENT AND SUBLETTING

Lessee shall not assign or encumber Lessee's interest in this Lease or in the Premises, or sublease all or part of the Premises without Lessor's prior written consent.

22. DISPOSSESSION

If Lessee is lawfully deprived of the possession of all or any part of the Premises by a party other than Lessor, Lessor may, upon receipt of notice from Lessee setting forth the circumstances, either install Lessee in possession of the Premises or terminate this Lease and refund to Lessee the pro rata amount of any prepaid unearned rent after receipt of such notice. Lessor shall not be liable to Lessee for any loss, damage or claim resulting from such deprivation of possession.

23. NOTICES

All notices shall be in writing and shall be deemed to have been given when delivered personally or deposited in the United States mail, registered or certified, postage prepaid, and addressed to the party to whom the notice is directed at the address set forth in the Basic Lease Terms. Payments to Lessor shall be made at the address for notices or Lessor may change the address for payments by giving the other party notice to that effect.

24. ATTORNEY'S FEES

If either party brings any action against the other to enforce or collect any sum due under this Lease or if the Lessor brings action for unlawful detainer of the Premises, the losing party shall pay the reasonable attorney's fees of the prevailing party in addition to the judgment and court costs.

25. LESSOR'S RIGHT-OF-WAY

Lessee shall permit Lessor, the agents and employees of Lessor to enter into and upon the Premises at all reasonable times for purposes of inspecting, posting notices of nonresponsibility, or exhibiting the Premises to prospective tenants or buyers.

26. NON-WAIVER

Lessor's failure to enforce or exercise its rights with respect to any provision hereof shall not be construed as a waiver of such rights or of such provision. Acceptance of rent or any sum shall not be a waiver of any preceding breach by Lessee of any provision hereof, regardless of Lessor's knowledge of such preceding breach at the time of acceptance of such rent; nor shall acceptance be a waiver in any way of Lessor's right to terminate at any time under Section D of the Basic Lease Terms.

27. JOINT AND SEVERAL LIABILITY

If Lessee is more than one person or entity, each such person or entity shall be jointly and severally liable for the obligations of Lessee hereunder. If Lessee is a husband and wife, the obligations hereunder shall extend to their sole and separate property as well as their community property.

28. TIME OF ESSENCE

Time is of the essence of each provision of this Lease.

29. ENTIRE AGREEMENT

This Lease sets forth the entire agreement between the parties with respect to the leasing of the Premises and supersedes all prior agreements, communications, and representations, oral and written, express or implied, since the parties intend that this be an integrated agreement. This agreement shall not be modified except by written agreement of the parties.

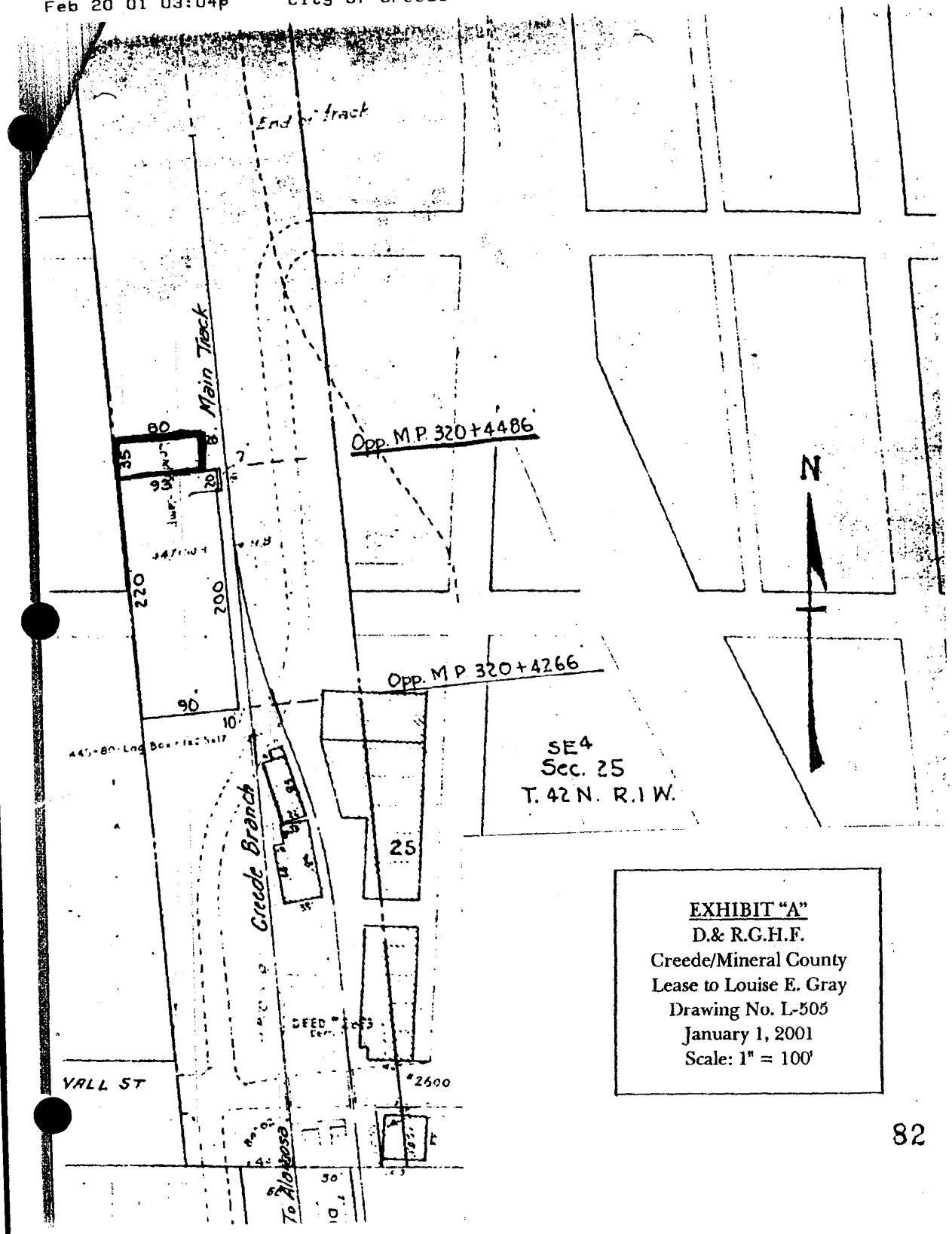

EXHIBIT "A"
D.& R.G.H.F.
Creede/Mineral County
Lease to Louise E. Gray
Drawing No. L-505
January 1, 2001
Scale: 1" = 100'

EXHIBIT B

GENERAL INSURANCE REQUIREMENTS ("GIR")

Company shall be furnished evidence of insurance in connection with the foregoing Agreement. Such insurance shall be written by an insurance company having a Best's rating of B+13 or better and licensed to do business in the State of Colorado, meeting the requirements stated below in form satisfactory to Company, for each of the following types of insurance in amounts not less than the amounts herein specified.

The terms "Agreement" as herein used shall refer to the Lease, License, or Permit, including supplemental agreements thereto, to which this Exhibit B is attached and made a part of; "Company" shall refer to the Lessor, Licensor, or Permittor named in the Agreement; "Lessee," "Licensee," or "Permittee," shall refer to the Lessee, Licensee, or Permittee, (whichever is applicable), named in the Agreement; and "Premises" shall refer to the property described in the Agreement and as shown on the attached print.

LIABILITY INSURANCE REQUIREMENTS

1. COMPREHENSIVE GENERAL LIABILITY INSURANCE OR COMMERCIAL GENERAL LIABILITY INSURANCE ON AN OCCURRENCE BASIS shall have a combined single limit of not less than $1,000,000 per occurrence and shall provide for the following:

   a) Such insurance is primary, without right of contribution from other insurance which may be in effect.
   b) Such insurance shall not be invalidated by the acts or omissions of other insureds.
   c) Such insurance shall not be materially modifiable or cancellable without thirty (30) days' prior written notice to Company (except in the case of cancellation for nonpayment of premium in which case cancellation shall not take effect until at least ten (10) days' notice has been given to Company). This provision is referred to below as "Notice of Modification or Cancellation."
   d) Company shall be named as additional insured.

e) Contractual liability with deletion of the exclusion for operations within fifty (50) feet of railroad track and deletion of the exclusion of explosion, collapse, or underground hazard, if applicable. (NOTE: For any license or permit involving property within fifty (50) feet of track, the exclusion for operations within fifty (50) feet of track will apply unless eliminated by endorsement).

f) Premises, products/completed operations, and personal injury coverage.

g) Severability-of-interest clause.

h) In the case of commercial general liability insurance, the policy must also provide for aggregate coverage at each location and for reinstatement of the aggregate in the event the limits of the policy are exhausted.

i) If the proposed use of the Premises involves a hazard which poses particular risk to the environment, the policy must cover sudden and accidental pollution on a named-peril basis to address the hazard.

2. WORKER'S COMPENSATION INSURANCE shall have the limits not less than those required by the statute, shall cover all persons employed by Lessee, Licensee, or Permittee, as the case may be, in the conduct of its operations on the Premises and shall provide for the following:

a) Waiver of subrogation against Company, and

b) Notice of Modification and Cancellation.

3. EMPLOYERS' LIABILITY INSURANCE shall have a limit of not less than $1,000,000 and shall be endorsed to provide for (a) Notice of Modification or Cancellation, and (b) waiver of subrogation against Company.

4. UMBRELLA OR EXCESS LIABILITY INSURANCE shall provide that if the underlying aggregate is exhausted, the excess coverage shall drop down as primary insurance, and shall provide for Notice of Modification and Cancellation.

A properly completed certificate of insurance shall be furnished to Company for approval.

DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION

A COLORADO NOT-FOR-PROFIT/TAX-EXEMPT CORPORATION

February 15, 2001

Mr. & Mrs. Dale E. Pizel
P.O. Box 400
Creede, CO 81130

Re: New right-of-way Lease

Dear Mr. and Mrs. Pizel:

On May 24, 2000, the Denver & Rio Grande Railway Historical Foundation (DRGHF) consummated the purchase of the right-of-way from South Fork (Derrick) through the City of Creede. The rear of your commercial building in Creede occupies a portion of right-of-way owned by DRGHF. As legal successor to the Union Pacific Railroad, all portions of our right-of-way will be accounted for and Leases generated accordingly.

Therefore, accompanying this letter please find your new Lease, in duplicate copies. The rental amount has increased modestly in comparison to the dramatic increase in property values.

If it is your desire to continue to occupy right-of-way of the DRGHF, please execute both copies of the Lease documents, initial each page, return both copies for our execution and please include your check for the annualized amount within thirty (30) days upon receipt of this notice. We will forward a fully executed original to you for your records.

If your preference is to terminate your occupancy, please do so within the same thirty (30) day period and make arrangements to vacate our right-of-way in accordance with the terms and conditions as agreed to within your previous Lease.

Thank you in advance for your prompt attention.

Sincerely,

Donald Shank
President, DRGHF

enclosure/ 2 copies lease document

FOUNDATION OFFICE: 1474 MAIN AVENUE, SUITE 223, DURANGO, CO 81301
TEL: 970.259.9498 FAX: 259.0202 E-mail: drghf@frontier.net

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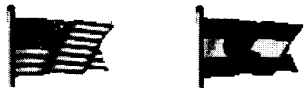

Wagon Wheel Gap Route

of the

Denver & Rio Grande Railway

Home

As any non profit Foundation goes money always is a object and this is our Foundation. We need to replace 22.000 railroad ties, finish paying off

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purchase some rail and build a shop facility. Although we are well underw support would be greatly appreciated.

There are many ways to be part of this railroad. Below you will find a m the D&RG Historical Foundation, a railroad tie order form to purchase tie(s Foundation number if you are interested in corporate or large scale donati Foundation is in need of. Remember this is a Non-profit Foundation so all deductible.

Denver & Rio Grande Railway Historical Foun

A Colorado Not-For-Profit/Tax-Exempt Corporation

Membership Application Form

NAME:_____

COMPANY NAME:_____

ADDRESS:_____CITY:_____

STATE:_____ZIP:_____-_____PHONE_____-_____-_____F

E-MAIL:_____WEB ADDRESS:_____

MEMBERSHIP LEVEL: Please circle the appropriate number of your choice-

1.	**Individual Annual**	**$25.00**
2.	**Family Annual**	**$35.00**
3.	**Contributing Annual**	**$50.00**
4.	**Sustaining Annual**	**$100.00**
5.	**Lifetime Sponsor**	**$500.00**
6.	**Patron**	**$1000.00**
7.	**Benefactor**	**$5,000.00**

I would also like to make a additional Tax-Deductible donation towards th (s))-

Project: Creede Branch Rehabilitation **Project: RGS Coach #252** **Pr**

Project: South Fork Restoration Facility Museum **Project: Creede Depot** **Proj**

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Project: Maintenance-Of-Way Equipment **Project:** Third Rail (n.g.)

In the amount of; $_____

Please make your Tax-Deductible check payable to: D&RG HISTORICAL

Foundation Office: 1474 Main Avenue, Suite 223, Durango, CO

Phone: 970-259-9498 Fax: 970-259-0202 Email:drghf

Denver & Rio Grande Railway Historical Found

A Colorado Not-For-Profit/Tax-Exempt Corporation

Railroad Tie Order Form

NAME:_____

COMPANY NAME:_____

ADDRESS:_____CITY:_____

STATE:_____ZIP:_____-_____PHONE_____-_____-_____F

E-MAIL:_____WEB ADDRESS:_____

RECIPIENTS NAME AND ADDRESS (If same as above, just write same in na

NAME:_____

COMPANY NAME:_____

ADDRESS:_____CITY:_____

STATE:_____ZIP:_____-_____PHONE_____-_____-_____F

E-MAIL:_____WEB ADDRESS:_____

Purchase a new replacement tie and help rebuild one of America's Greates numbered and the I.D. number will be placed on a Tie Certificate. Once ins the exact location so you can stand on "your" piece of history.

Number of tie(s) ordered:_____Or circle the appropriate number

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		Non-framed	Framed
1.	Individual Tie (1 tie)	$45.00	$70
2.	Grandy Dancer (10 ties)	$450.00	$ Call
3.	Brake Man (25 ties)	$1125.00	$ Cal
4.	Conductor (50 ties)	$2250.00	$ Cal
	(+ A FREE 10 year Membership)		
5.	Engineer (100 ties)	$4500.00	$ Cal
	(+ A FREE Lifetime Membership, A 200 foot stretch dedicated in your name, special surprise)		
6.	Own a Curve (250 or more ties)	$11,250.00+	$ Call
	(+ A FREE Lifetime Membership, A Curve dedicated in your name, a loved o name, A Memorial Plaque, A Dedication Ceremony, Plus some very uniqu		

TODAY'S DATE _____-_____-2000 Order Taken By:_____

In multiple tie orders, do you want ties placed in different locations? YES_

Is this purchase a surprise for someone? YES_____ NO_____ Is this a rush NO_____

What date does the tie certificate need to arrive? _____-_____-2000

I would also like to make a additional Tax-Deductible donation towards th (s))-

Project: Creede Branch Rehabilitation **Project:** RGS Coach #252 **Pr**

Project: South Fork Restoration Facility Museum **Project:** Creede Depot **Pro**

Project: Maintenance-Of-Way Equipment **Project:** Third Rail (n.g.) **I**

In the amount of; $_____

Please make your Tax-Deductible check payable to: D&RG HISTORICAL

Foundation Office: 1474 Main Avenue, Suite 223, Durango, CO

Phone: 970-259-9498 Fax: 970-259-0202 Email:drghf

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Denver & Rio Grande Railway Historical Foun

A Colorado Not-For-Profit/Tax-Exempt Corporation

Large Scale or Corporate Sponsor Information

If you are a company, know of a company or individual that would be inte MAJOR part of America's History with a large scale donation to a 501 (c)(3 Profit Foundation, We would like to hear from you. Please take the time to mail or call us. THANKS FOR HELPING AID IN THE REBIRTH OF ONE OF AM RAILROADS.

NAME:_____

COMPANY NAME:_____

ADDRESS:_____CITY:_____

STATE:_____ZIP:_____-_____PHONE_____-_____-_____F

E-MAIL:_____WEB ADDRESS:_____

Please make your Tax-Deductible check payable to: D&RG HISTORICAL

Foundation Office: 1474 Main Avenue, Suite 223, Durango, CO

Phone: 970-259-9498 Fax: 970-259-0202 Email:drghf

Donations of Equipment Needed.....

The Foundation is in need of the following:

1. Bob-Cat - small tractor(s)
2. Tractors - front loaders - back hoe
3. Bush Hogs
4. Spray and fire suppression equipment

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5. Shop Equipment - welders, lathes, drill presses, hand tools, etc.....

6. Railroad Equipment - Any style, Any form...

7. Rail car equipment (speeders), rail trailers

8. High Rail Equipment

9. Pre-fabricated buildings or building materials

We have limited ability to pick-up this equipment, so figure cost of shipment again equipment.
If you have these or other equipment you think the Foundation could use, please l deductible... Thanks.....

This is not an official web site of the D&RG Historical Foundation

The name Denver & Rio Grande Railway, Wagon Wheel Gap Route, Creede Branch and associated Logos are are owned by the Denver & Rio Grande Railway Inc.

Photos and Text are Copyrighted by Richard Cutter - Photos can be used for non-commercial use if plainly identified as to copyright holder and Location "at Wagon-Wheel-Gap-Route, D&RG Railway Colorado"

For problems or questions regarding this web contact [acefiero@compuserve.com]. Last updated: Sep. 16, 2000.

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IF YOU'RE NOT RECYCLING

Wagon Wheel Gap Route

of the

Denver & Rio Grande Railway

Welcome to the DENVER & RIO GRANDE RAILWAY HISTORICAL web site. Covering the re-birth of the both the name and the Wagon Wheel Gap Route section along the upper Rio Grande River. Reconstruction is currently in progress. Read on to learn about it's history and future.

This site was designed to give you a idea of what our Foundation so loves and wants to preserve for future generations. Lets begin with a little history of this very famous railroad-

WELCOME RETURNING GUEST'S- I've added this little section to tell all the one's returning to still wonder about our site. We update this site almost daily so check out all the new stuff, like our Merchandise section. Plus we have added a Latest News section to keep you up to date.

In the 1880's the Denver and Rio Grande Railway was in a building frenzy throughout Colorado. One of the most beautiful areas was on the head waters of the Rio Grande River at a mountain pass known as Wagon Wheel Gap. Hot Springs in this area as well as the Cool Summers at its 8,500 foot elevation made it a perfect resort area for the friends and guests of General William Jackson Palmer who was running the Railroad. A rail line was extended to this spot from the end of the line in Del Norte. With mining demands high, the line was extended to the mountain mining town of Creede a few years later. This line was active through 1985 when the last few cars of ore was carried out. The line that carried hundreds of thousands of passengers and millions in silver ore fell quiet.

Roll forward to the Spring of 2000 when the Denver & Rio Grande Historical Foundation, Lead by Don Shank, purchased this 21.6 mile line of scenic mountain meadows, rivers and 1,000 foot cliffs. This area is well known for its scenic vistas, historic towns and mines, fishing, hunting and just a wonderful get-away-from-it place.

The Line is now being cleaned of brush and small trees, rocks removed and ties replaced where needed. Being a volunteer group spectacular progress has been made. With 10 days of clean up 19.5 miles has been opened with hand tools, a bob-cat tractor and a Fairmont Speeder. Last few places will need tractor power to remove large rocks and open highway grade crossings. This will be completed by the end of the summer months, thus allowing open access to all 21.6 miles of the best Standard Gauge Scenic Rail in the West. The Wagon Wheel Gap Route.....

Future holds plans for return of steam power and a turn of the century look to all right-of-the-way improvements. Addition of a third rail will return the railroad back to its original configuration of both Narrow Gauge and Standard Gauge. Giving the public the only railroad in the US with a three rail set-up.

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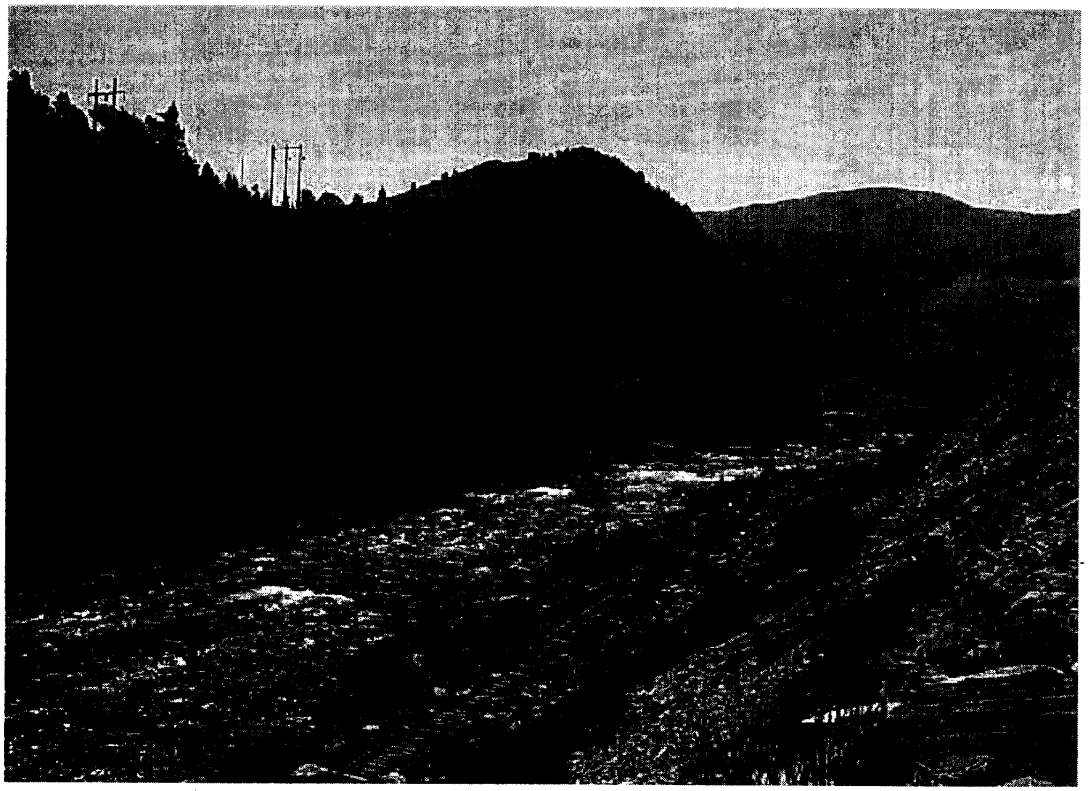
Main Stations will be at South Fork and Creede with full services offered and additional Flag-Stop Stations along the way will service Fisherman, Campers, and Hikers on a as needed basis.

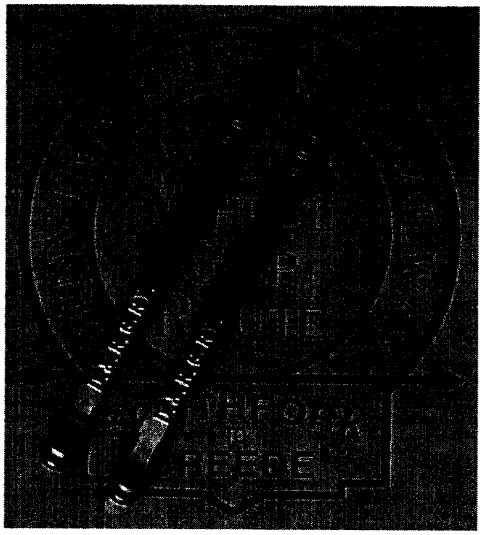
Join into the fun by lending support, *Contact the Foundation at:*

drghf@frontier.net



doing so you show you are helping save a great piece of history.

Please make your check payable to: D&RG HISTORICAL FOUNDATION
Foundation Office: 1474 Main Avenue, Suite 223, Durango, CO 81301-5195
Phone: 970-259-9498 Fax: 970-259-0202
Email:drghf@frontier.net



***D&RG RY CAR SEAL'S-**

Own a BRAND-NEW D.&.R.G.RY. Car Seal. That's right, These seal are the FIRST seals for the D&RG RY. These 8 1/2" long beauties are the real thing and you can own one from the beginning of this new railroad. They are in limited supply and come consecutively numbered. Starting seal began with 00001 and goes up from there. ALL of the money off these seals goes to the Foundation for the railroad's rebuild.

$ 5.00 (U.S.) Shipping $ TBD

A special thanks goes to Bob Shank Jr. who provided the Foundation a limited quantity of these seal's for our railroad. THANKS BOB

***D&RG RY WAGON WHEEL GAP ROUTE COFFEE MUG-**

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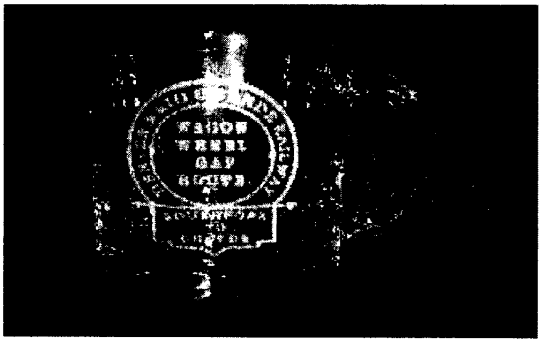
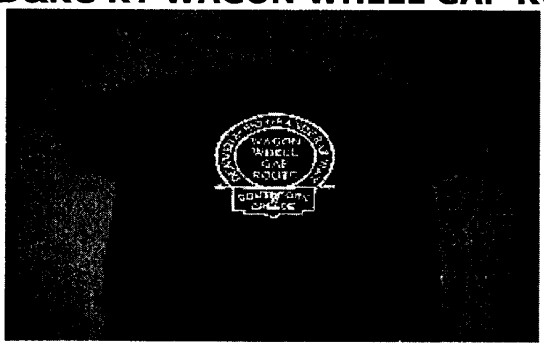


Wake-up in the morning to the Wagon Wheel Gap Route Emblem shinning bright on your coffee mug. These transparent glass Mug's are etched with our insignia right on it. So be the first on your block and impress all your friends with these beautifully done mug's. ALL of the money raised by these cups goes to the Foundation for the railroad's rebuild.

$10.00 (U.S.) Shipping $ TBD

*D&RG RY WAGON WHEEL GAP ROUTE Golf-SHIRT-



Suprise everyone with a new piece of history, a D&RG RY shirt. These golf shirts are available in Grey or white with the bold black print or blue or green with bold white print of the small D&RG RY Herald on front and a large Herald on back. ALL of the money off these shirts goes to the Foundation for the railroad's rebuild.

$25.00 (U.S.) Shipping $ TBD

*D&RG RY WAGON WHEEL GAP ROUTE DECAL-

Need a window in your train room spiced up???? Want to add some excitement to your car??? You now can have the same decal our work equipment has on them. This very large laser cut decal measures 12" x 12". Just peal the bottom layer back, adhere to object, peal off the top cover and your part of the D&RG RY. ALL of the money off these decal's goes to the Foundation for the railroad's rebuild. We can make these decal's at any size, just call for pricing.

$40.00 (U.S.) Shipping $ TBD

A special thanks goes to Richard Cutter who's working on this project for the Foundation. THANKS RICHARD

*D&RG RY TIE CERTIFICATE-

Own a BRAND-NEW D.&.R.G.RY. Tie. That's right, you can add your support by purchasing a tie on the actual railroad line. This support program has been growing like crazy, so don't be the last one to join in. A "Tie Certificate" is issued to the lucky purchaser or recipient with an I.D. number on the cert. Each new tie will receive an I.D. tag that coincides with the number on the cert. After the tie's installation, the exact location will be forwarded to you. These Certificate's are great for Birthday's, Anniversaries or any other special times of the year.

$45.00 Non-framed / $70.00 Framed (U.S.) Shipping $ TBD

Please let us know as to your desires

Please make your check payable to: D&RG HISTORICAL FOUNDATION
Foundation Office: 1474 Main Avenue, Suite 223, Durango, CO 81301-5195
Phone: 970-259-9498 Fax: 970-259-0202
Email:drghf@frontier.net

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This is not an official web site of the D&RG Historical Foundation

The name Denver & Rio Grande Railway, Wagon Wheel Gap Route, Creede Branch and associated Logos are are owned by the Denver & Rio Grande Railway Inc.

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For problems or questions regarding this web contact [acefiero@compuserve.com]. Last updated: Sep. 16, 2000.

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DISTRICT COURT, MINERAL COUNTY, COLORADO

Court Address: Mineral County Courthouse.
North First Street
Creede CO 81130
Telephone and Facsimile: 719-658-2575

CITY OF CREEDE, a Colorado Municipal Corporation,

Plaintiff,

-vs-

DENVER & RIO GRANDE RAILWAY HISTORICAL Foundation, a Colorado Not-For-Profit Corporation and DONALD H. SHANK,

Defendants.

▲ COURT USE ONLY ▲

Case Number 00-CV-4

Div. _____ Ctrm. _____

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AFFIDAVIT OF B.J. MYERS IN SUPPORT OF MOTION TO TAKE DEPOSITION OF DONALD H. SHANK PRIOR TO ENTRY OF CASE MANAGEMENT ORDER

STATE OF COLORADO)
) ss.
COUNTY OF Mineral)

B. J. Myers, being duly sworn, states:

1. I am the Mayor of the City of Creede, a Colorado Town. I have held that office since April, 2000.

2. I am acquainted with the facts set forth herein and the statements in this Affidavit are made based on my personal knowledge.

3. The past 9 months in Creede have been marked by extraordinary turmoil arising from the purported takeover of the former Denver & Rio Grande Western railroad right of way between South Fork and Creede by a promoter named Donald H. Shank, who is using a Colorado non-profit corporation he controls for the purpose of attempting to force both the City of Creede and landowners and businesses in the City of Creede to grant him concessionary real estate rights, including leaseholds, to those parts of the former D&RGW right of way lying within the City of Creede and which he claims now belong to the Foundation which is a defendant in this case.

4. Mr. Shank's claims that his Foundation now owns the entire D&RGW right of way in Creede are disputed. The Colorado Attorney General has taken the position, in writing, that a critical lease, from the State of Colorado to Mr. Shank's Foundation's predecessor, the Denver & Rio Grande Western Railroad, was terminated due to cessation of rail service in Creede many many years ago, as the lease from the State provided specifically for its termination if rail service ceased for a period of 12 months. It is undisputed that there was such a cessation of rail service. It is also undisputed that a substantial part of the right of way situated within the City of Creede, is on state land, controlled by the Colorado State Land Board, which has competence over that land.

5. Mr. Shank is currently embarked on three distinct types of activity, all of which are

disruptive and all of which are causing irreparable harm to the City of Creede and its residents. Those disruptive activities are as follows:

A. **Fundraising.** Mr. Shank is carrying out vigorous fundraising activities, both personally and through his Foundation. Those activities are based on representations Mr. Shank has made and continues to make that he will establish a tourist train operating from South Fork to Creede, using narrow gauge rails and steam-powered equipment. Notwithstanding a representation by Mr. Shank's Chicago counsel. Thomas McFarland, to our counsel, George M. Allen, that Mr. Shank has ceased his fundraising activities pending determination of jurisdiction over this action, his primary fundraising mechanism, a world wide web site with the URL **http://www.wagon-wheel-gap-route.homepage.com** continues to be available and continues to solicit contributions and sales. Exhibit B. to this Affidavit is a printout from the website made on February 20, 2001, **after** the letter from Mr. Shank's letters saying he would cease fundraising. Since those solicitations and sales are based on both explicit and implicit representations of real property rights for such tourist train activity within the City of Creede and on City property, those representations leave the City of Creede open to both irreparable damage to its stature as a unique tourist destination community and damage to its financial well-being due to what will be at best confusion as to whether the City of Creede can enforce its own zoning and police and safety protections and, at worst, collapse of its financial standing and ability to raise money in capital markets due to confusion and uncertainty about the City's control over its own property rights, to which Mr. Shank has laid claim and demanded vacation by the City of property within Section 36, used historically by the City for public purposes with full knowledge of all involved parties, including the State of Colorado, the Denver & Rio Grande Western Railroad, the Southern Pacific Railroad and the Union Pacific Railroad. Third-party liability or exposure to claims of third parties who are deceived or defrauded by Mr. Shank's and the Foundation's claims of rights to operate a tourist train are also a matter of great concern to Creede and a source of probable irreparable damage. Creede is inevitably exposed to such claims and may not have sovereign immunity against them, since being implicated in operation of a tourist train is probably not a governmental activity.

B. **Claims to Public Property.** Mr. Shank has purported to terminate a lease of land by the D&RGW railroad to the City of Creede. Both our counsel and

one of Town Trustees with great expertise, retired District Judge Merle Knous, have advised that the purported termination of lease is of no probable consequence but public demands that the Town terminate a lease and yield Town property rights to Mr. Shank are disruptive to the same Town interests described in paragraph 5-A above.

C. **Claims to Private Property.** As shown by the attached draft and lease demand letter attached hereto as Exhibit A, Mr. Shank is attempting to force private citizens in the City of Creede to pay for 30 day rollover leasehold rights to land they have occupied for years and in some cases decades, based on what is probably a fraudulent claim that Mr. Shank's Foundation controls such land. The leases Mr. Shank seeks to obtain are not only extortionate, but also oppressive, requiring, for example, that Creede property owners obtain insurance at limits of $1 million and indemnify Mr. Shank's Foundation for harm. Mr. Shank's demands on private landowners threaten to depress or destroy their land values by reason of clouds he has placed on their land titles and his continuing slander of private land titles exposes the City of Creede to severe diminution of its tax base due to the depressing effect on land values flowing from his extortionate and fraudulent schemes.

6. One Creede citizen, Louise Gray, was told she must lease the land on which her garage is situated, and was told she must pay Mr. Shank and his Foundation $300.00 per year for land she has owned and occupied for many years. I know Louise Gray. She is elderly and retired from her job at the hardware store and lives on her social security and modest personal supplemental income from activities such as picking up aluminum cans and reselling them. For Mr. Shank to try to force her to pay him $300 per year as lease rent for land he and his Foundation do not own and probably never will own, with the threat he will close access to Louise Gray's garage and preclude use of her car, purchased with funds from her scavenging, is cruel and extortionate beyond any comprehension. A true copy of the draft lease tendered to Ms. Gray by Mr. Shank is attached as Exhibit A. How in the world will Louise Gray ever be able to buy $1 million insurance coverage for Shank's Foundation? And if she does not come up with the insurance, will she lose access to her house, her garage and her car even after she pays Mr. Shank his extortionate rent? Attached to this Affidavit are copies of the draft leases and transmittal letters sent to Louise Gray and also to Mr. and Mrs. Dale Pizel. It is my understanding that similar extortionate demands have been made on numerous other Creede landowners.

7. Mr. Shank's Foundation has been granted the purported right to operate interstate freight rail service by the Surface Transportation Board. The STB has no jurisdiction over tourist trains and nothing in the STB's authorization to the Foundation to operate interstate freight rail service has anything to do with the steam-powered tourist train Mr. Shank is promoting.

8. The entire question of rights, if any, of the Foundation to do anything with the right of way other than operate overhead freight rail service on it, is either unresolved or clearly dictated by existing principles of state real property law. The following points are reasonably clear to me however:

A. Mr. Shank's Foundation does not own the right of way. At best it has a right to use of the right of way to provide interstate freight rail service. Only use of the right of way for provision of interstate freight rail service under the STB grant to the Foundation can engage any federal regulatory principles which can be claimed to exempt the Foundation from local land use restrictions.

B. Within the City of Creede, some of the right of way is owned by private landowners, some by the State of Colorado and some, such as Loma Street in Section 25, by the City of Creede. Mr. Shank's Foundation owns none of the right of way. Specifically, it does not own any Creede railway station, as claimed by its fundraising representations on the Foundation's website ("Main stations will be at South Fork and Creede with full services offered."(Exhibit B)) and that representation is misleading and fraudulent to contributors and investors. There is a Creede railroad depot, owned by the Historical Society, not by Mr. Shank's Foundation.

C. Notwithstanding the ambiguity or outright baselessness of his claims to real property rights within Creede, Mr. Shank has acted vigorously in abuse of legal process or in outright disregard of legal process to attempt to extort consideration from both the City of Creede and its citizens with no apparent right to do so and without any colorable compliance with Colorado's forceable entry and detainer statute. Mr. Shank's conduct, including the presentment of unfounded criminal charges, amounts to a thus far unrestrained self-help landtaking regime in derogation of rights of the City of Creede and its citizens.

D. No shipper exists within Creede to ship by rail in interstate commerce.

E. No shipper exists beyond Creede to ship by rail to Creede in interstate commerce.

F. The D&RGW right of way has not been used for many years and is in fact abandoned.

G. The only apparent activities being carried out by Mr. Shank and the Foundation are related to a tourist train operation. None of the fundraising or real estate activities being undertaken by Mr. Shank and his Foundation relate in any rational or recognizable way to carrying out the kinds of STB-regulated activities for which he has obtained the right to use the right of way.

9. Two business sales have failed to reach consummation due to the confusion and misrepresentations Mr. Shank has made with regard to real property in Creede. Those prospective sales were in serious negotiation stages, but the deals fell through due to claims by Mr. Shank and his Foundation to rights to real property. The deals involved the property known as The Old Cobblestone Cafe (the south building of Old Miner's Inn) and the Old Firehouse Bed & Breakfast.

10. Mr. Shank's Foundation is in default on it obligations to make payment on its promissory note to the Union Pacific pursuant to its Offer of Financial Assistance. Mr. Shank's Foundation is insolvent and unable to operate overhead interstate freight rail service from South Fork to Creede.

11. Mr. Shank represented to the Surface Transportation Board, in obtaining Offer of Financial Assistance rights to operate overhead interstate freight rail service, that he would not disrupt Creede. Since being awarded OFA rights, he has done nothing except disrupt Creede.

12. Mr. Shank's transparent long-term goal is to hang on to his OFA rights for five years, with an expectation that he will then be granted the right of way by the STB

13. Not one visible thing has been done by Mr. Shank or his Foundation to actually provide interstate freight rail service to or from Creede. Not one website page, not one published tariff, not one advertisement for business from shippers, not one purchase of freight rail equipment, not one bridge or tie or ballast replaced on the right of way to facilitate movement of freight overhead.

14. Mr. Shank's conduct is totally consistent with a land grab, using other people's money (his contributors) and totally inconsistent with operation of a freight rail service.

I have read the above affidavit and the statements therein are true.

B.J. Myers

Subscribed and sworn to before me this 21st day of February, 2001.

Notary Public

VIRGINIA A. WYLEY
NOTARY PUBLIC
STATE OF COLORADO
My Commission Expires 7/14/2003

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

FILED
U.S. DISTRICT COURT
DISTRICT OF COLORADO
2001 FEB 22 PM 3:32
JAMES R. MANSPEAKER
CLERK
BY _____ DEP. CLK

CIVIL ACTION NO. 01-0318

CITY OF CREEDE, a Colorado Municipal Corporation,

Plaintiff,

v.

DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION, a Colorado Not-For-Profit Corporation,

and

DONALD H. SHANK,

Defendants.

NOTICE OF REMOVAL

Pursuant to 28 U.S.C. § 1441 and 28 U.S.C. § 1446, Defendants DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION (Foundation) and DONALD H. SHANK (Mr. Shank) hereby file this Notice of Removal to this Court of a civil action brought in Mineral County, Colorado, of which this Court has original jurisdiction.

1. The parties filing this Notice are Defendants in a civil action commenced on November 7, 2000 in the District Court of the State of Colorado for the County of Mineral, entitled *City of Creede, Plaintiff, vs. Denver & Rio Grande Railway Historical Foundation and Donald H. Shank, Defendants*, No. 00-CV-4.

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1928) ("We are of the view that the question [of the extent to which an interstate rail carrier has exclusive use of its railroad right-of-way] is one of general jurisprudence, and that we are not bound to follow the Kansas decisions"). As to remedies provided in the Interstate Commerce Act in regard to interstate rail carriers, there is a specific preemption of State law in 49 U.S.C. § 10501(b).[2/] A United States District Court has original jurisdiction to issue a declaratory judgment determining whether municipal zoning and land use laws, as applied to railroad right-of-way, are preempted by virtue of 49 U.S.C. § 10501(b). *See Norfolk Southern Railway Company v. City of Austell, Georgia, supra.* The Surface Transportation Board is in the process of conducting a thorough review of the nature and effect of the federal preemption in 49 U.S.C. § 10501(b) as it relates to the appropriate role of state and local regulation, including the application of local land use or zoning laws or regulations, as applied to railroad right-of-way land. *See* STB Finance Docket No. 33466, *Borough of Riverdale -- Petition for Declaratory Order -- The New York, Susquehanna and Western Railway Corporation*, decision issued Sept. 10, 1999 (not printed), copy attached to this Notice as Appendix 4. The municipality in that case brought the matter to the Surface Transportation Board in recognition of that agency's primary jurisdiction over matters of that kind. *Id.* at 1-3. It is likely that Defendants filing this Notice will file a motion seeking referral of that issue by this Court to the Surface Transportation Board under the doctrine of primary jurisdiction, which appears to be the most appropriate procedure in

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[2/] While 49 U.S.C. § 10501(b) preempts State law as to remedies provided in 49 U.S.C. Subtitle IV, Part A, with respect to regulation of rail transportation, that statute does not preclude concurrent jurisdiction in the Surface Transportation Board and the United States District Courts. *Pejepscot Industrial Park, Inc. v. Maine Central Railroad Co.*, 215 F.3d 195, 204-205 (1st Cir. 2000) ("The thrust of the statute is to federalize these disputes, not to deprive the federal courts of jurisdiction").

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order to promote uniformity in the determination of that issue. *See Pejepscot Industrial Park, Inc. v. Maine Central Railroad Co., supra*, 215 F.3d at 205-206.

WHEREFORE, Defendants provide Notice of removal of the State Court action to this Court.

Respectfully submitted,

Raymond P. Micklewright

RAYMOND P. MICKLEWRIGHT
WOLF & SLATKIN, P.C.
44 Cook Street, Suite 1000
Denver, CO 80206-5827
(303) 355-2999

Attorney for Defendants

02/27/2001 09:29 970-728-4263 ALLEN - TELLURIDE PAGE 07

DISTRICT COURT COUNTY OF MINERAL, COLORADO 201 No. Main Street Creede, CO 81130	
CITY OF CREEDE, a Colorado Municipal Corporation, Plaintiff, vs. DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION, a Colorado Not-For-Profit Corporation and DONALD H. SHANK, Defendants.	▲ COURT USE ONLY ▲ Case No. 00-CV-4 Division/Courtroom:
Raymond P. Micklewright Wolf & Slatkin, P.C. 44 Cook Street, Suite 1000 Denver, CO 80206-5827 Telephone: (303) 355-2999 Atty. Reg. #: 13009	

NOTICE OF FILING OF NOTICE OF REMOVAL

Pursuant to 49 U.S.C. § 1446(d), Defendants, Denver & Rio Grande Railway Historical Foundation and Donald H. Shank, hereby file a copy of a Notice of Removal which they filed on February 22, 2001 in United States District Court for the District of Colorado in *City of Creede v. Denver & Rio Grande Railway Historical Foundation and Donald H. Shank*, Civil Action No. 01-B-0318

Respectfully submitted,

WOLF & SLATKIN
Professional Corporation

By: Raymond P. Micklewright
Raymond P. Micklewright, #13009
Attorney for Defendants
44 Cook Street, Suite 1000
Denver, CO 80206-5827
303-355-2999
303-329-6826 fax

112

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Honorable Lewis T. Babcock
Chief United States District Judge

Honorable Craig B. Shaffer
United States Magistrate Judge

CIVIL ACTION NO. 01-B-0318

CITY OF CREEDE,
a Colorado Municipal Corporation,

Plaintiff,

-vs-

DENVER & RIO GRANDE RAILWAY
HISTORICAL FOUNDATION,
a Colorado Not-For-Profit Corporation
and DONALD H. SHANK,

Defendants.

AFFIDAVIT OF ED HARGRAVES

STATE OF COLORADO)
) ss.
COUNTY OF MINERAL)

Affiant, Ed Hargraves, being duly sworn, states:

1. My name is Ed Hargraves. I have resided in Creede, Colorado continuously since 1953.
2. The statements herein are based on my own knowledge and observation.
3. I am familiar with the former Denver & Rio Grande Western (D&RGW) railroad right-of-way leading from South Fork, Colorado to Creede, Colorado.

3. I am familiar with the former Denver & Rio Grande Western (D&RGW) railroad right-of-way leading from South Fork, Colorado to Creede, Colorado.

4. I have recently reviewed the records of the Creede Historical Society and the materials contained in the Creede Museum. The museum is located in the building that was once the railroad depot in Creede.

5. While there has been no operating train within the City of Creede since the early 1970's, some railroad tracks are still in existence. They enter the town from the south, running first through Section 36 and then terminating in Section 25.

6. That part of the railroad right-of-way on Section 36 is school land, administered by the Colorado State Land Board.

7. In the late 1960's, the State of Colorado leased the right-of-way land in Section 36 to the Denver & Rio Grande Western Railroad (D&RGW) providing that, if the rail service ceased for 12 months, this lease terminated. Thus, the right-of-way terminated may years ago because no rail service has been provided at any time since the early 1970's.

8. To my knowledge, neither the D&RGW, nor its successors, used or occupied any part of the right-of-way from approximately South Fifth Street and continuing south to the Creede City Limits, other than a strip 20 to 25 feet wide, including the track.

9. I have, in the day preceding the making of this affidavit, personally made a physical inspection of the railroad right-of-way from South Fifth Street, south to the Creede City Limits. On the basis of that inspection, I am able to state the following:

   There are no physical signs of any railroad-related use of the right-of-way, other than some existing tracks, ties and roadbed, on any part of the right-of-way from South Fifth Street continuing south to the Creede City Limits.

10. Exhibit A attached to this Affidavit is a plat, taken from the Creede Zoning Map, as maintained by the City of Creede, on which the railroad tracks are shown. A strip of land 25-feet in width, with the tracks at the center, is marked on the plat in the color orange.

11. On Exhibit A, marked in the color green, is all of the other land on the railroad right of way in Section 36 not occupied by the tracks and the 25-foot strip referenced in paragraph 10, above.

12. If the Denver & Rio Grande Historical Foundation ever reestablishes freight rail service into the City of Creede, it will be able to do so along the tracks and side clearance strip marked in the color orange on Exhibit A, as indicated in paragraph 10 above.

13. Exhibit B to this Affidavit, pages 1 through 37, is made up of photographs taken by Christine Funk, which accurately depict the right-of-way in Section 26 and Section 36 in June 2000. The photographs clearly confirm that, apart from the 20 to 25 foot wide strip for the tracks themselves (plus allowance for side clearance out to a total width of 25 feet), there is no sign or evidence of any railroad usage or activity on this right-of-way from the intersection of North Second Street and Loma Street in Section 25, south through Section 36 to the City Limits.

I have read the above affidavit and the statements therein are true to the best of my knowledge.

Ed Hoagmeier

Subscribed and sworn to before me this 8th day of March, 2001.

Virginia A Wyley
Notary Public

My commission expires: 1/10/03

VIRGINIA A. WYLEY
NOTARY PUBLIC
STATE OF COLORADO
My Commission Expires 1/10/2003

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Honorable Lewis T. Babcock
Chief United States District Judge

Honorable Craig B. Shaffer
United States Magistrate Judge

CIVIL ACTION NO. 01-B-0318

CITY OF CREEDE,
a Colorado Municipal Corporation,

Plaintiff,

-vs-

DENVER & RIO GRANDE RAILWAY
HISTORICAL FOUNDATION,
a Colorado Not-For-Profit Corporation
and DONALD H. SHANK,

Defendants.

MOTION TO REMAND THIS ACTION TO THE
DISTRICT COURT FOR MINERAL COUNTY, COLORADO
(28 U.S.C. §1447)

Local Rule 7.1 Compliance

The undersigned has conferred by telephone with Chicago attorney Thomas McFarland. Mr. McFarland has stated that he represents the defendants and that he will enter an appearance in this action. He has further stated that the defendants do not agree to this motion and oppose remand of this action to state court.

Motion to Remand

Plaintiff City of Creede, by its attorney, George M. Allen, hereby moves, pursuant to 28 U.S.C. §1447, to remand this action to the District Court for Mineral County, Colorado. This motion is based on the Declaration Under Penalty of Perjury of George M. Allen, filed herewith, on the affidavits of Ed Hargraves and B.J. Myers, filed contemporaneously with this motion, on the Memorandum Brief in support of this motion, also filed herewith, and on the Court's complete files and records in this action.

Grounds for the Motion

This action was commenced in state court to determine the applicability and enforceablility of Creede's residential zoning as to that part of the former Denver & Rio Grande Western railroad right of way in South Creede (Section 36 of Township 42 North, Range 1 West of the New Mexico Principal Meridian) on which railroad activity has never taken place.[1] The defendants entered an appearance and filed an Answer in the state court proceeding. But when we filed a motion to proceed forthwith to take the deposition of defendant Donald Shank, the promoter who has organized the so-called Denver & Rio Grande Railroad Historical Foundation to purportedly operate a steam-powered tourist train on the Creede Branch right of way, Mr. Shank's Denver counsel removed this

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[1] *The specific real estate as to which this action is applicable, and the **only** real estate to which this action is applicable, is the area marked in green on Exhibit A to the Hargraves affidavit. No land in Creede is **now** used for railroad activity as there is no railroad activity within Creede and has not been for three decades. So far as is known, the area marked in green on Exhibit A to the Hargraves affidavit has **never** been used for railroad activity at any time in the more than 110 year history of the right of way, dating back to the initiation of rail service to Creede in the late 19th Century (Myers Affidavit, paragraph 12).*

Mineral County, Colorado.

We further move that this Court award Plaintiff its costs, including attorney fees, associated with obtaining remand.

Respectfully submitted,

GEORGE M. ALLEN
206-A Society Drive
Telluride CO 81435
Telephone: 970-369-1000
Facsimile: 970-369-1009
Email: alnoma@yahoo.com

Counsel for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Honorable Lewis T. Babcock
Chief United States District Judge

Honorable Craig B. Shaffer
United States Magistrate Judge

CIVIL ACTION NO. 01-B-0318

CITY OF CREEDE,
a Colorado Municipal Corporation,

Plaintiff,

-vs-

DENVER & RIO GRANDE RAILWAY
HISTORICAL FOUNDATION,
a Colorado Not-For-Profit Corporation
and DONALD H. SHANK,

Defendants.

DECLARATION OF GEORGE M. ALLEN
(Made Under Penalty Of Perjury)

George M. Allen hereby declares, under penalty of perjury (18 U.S.C. §1001):

1. On or about March 6, 2001, I spoke with Al MacDowell, a federal civil servant in the Federal Rail Administration (and reached at 202-493-6236). Mr. MacDowell advised me that there is no federal standard or regulation prescribing a specific distance for side clearance from railroad tracks. He suggested Colorado might have a state law,

regulation or standard.

2. After speaking with Mr. MacDowell, I contacted Jack Baier of the Colorado Public Utilities Commission in Denver at 303-894-2855. Mr. Baier handles intrastate rail regulatory matters for the Colorado P.U.C.. Mr. Baier advised me that two Colorado P.U.C. decisions have addressed the issue of side clearance. He said the earlier case, decided in 1952 and involving, among others, the Denver & Rio Grande Western Railroad (the predecessor to the Defendant Foundation), held that minimum side clearance of 8 feet ten inches from the centerline of the tracks is required. He said a later case required ten foot clearance and that the current industry custom and usage in Colorado is for side clearance of 12 feet six inches from centerline, or a total distance of 25 feet.

3. On the morning of February 22, 2001, I sent the facsimile transmission attached to this declaration as Exhibit A to Raymond Micklewright, Denver counsel for the defendants. In it I confirmed to Mr. Micklewright that a hearing was expected to take place by conference telephone call the following afternoon (Friday, February 23, 2001) at about 2:00 p.m., to obtain a ruling on the motion we filed on February 21, 2001, seeking to require defendant Donald Shank to give his deposition at an early date (February 23 or 26 was requested).

4. The purported right of the defendant Foundation to operate rail service on the abandoned D&RGW right of way exists, if it exists at all, pursuant to the May 11, 1999 Decision of the Surface Transportation Board Decision of May 11, 1999, in

STB Docket No. AB-33, a copy of which is attached to this Declaration as Exhibit B.

I hereby declare under penalty of perjury, as provide in 18 U.S.C. §1001, that the statements set forth in the above Declaration are true to the best of my knowledge and belief.

George M. Allen

Dated: March 12, 2001

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Honorable Lewis T. Babcock
Chief United States District Judge

Honorable Craig B. Shaffer
United States Magistrate Judge

CIVIL ACTION NO. 01-B-0318

CITY OF CREEDE,
a Colorado Municipal Corporation,

Plaintiff,

-vs-

DENVER & RIO GRANDE RAILWAY
HISTORICAL FOUNDATION,
a Colorado Not-For-Profit Corporation
and DONALD H. SHANK,

Defendants.

MEMORANDUM BRIEF IN SUPPORT OF MOTION TO REMAND THIS ACTION TO THE DISTRICT COURT FOR MINERAL COUNTY, COLORADO

Facts

The Union Pacific railroad formally abandoned the Creede Branch of the historic Denver & Rio Grande Western Railroad, which extends 21.6 miles from Derrick, Colorado (near the recently incorporated town of South Fork, at the eastern base of Wolf Creek Pass) to Creede, Colorado, on January 25, 1999. The abandonment was duly published in the Federal Register on that date (64 FR 3740-41). There had been no rail service of any kind on that line since 1985 and no service into the

City of Creede since the early 1970's (Ed Hargraves March 8, 2001 Affidavit, paragraph 7).

The Defendant Foundation, organized by Defendant Donald Shank, a Durango, Colorado-based promoter, has purported to obtain operating rights over the Creede Branch by making an Offer of Financial Assistance to Union Pacific. In a Decision dated May 11, 1999, the STB authorized rail service by the Foundation, but conditioned its suspension of the Union Pacific's previously-filed abandonment notice on consummation of sale of the right of way to the Foundation (George M. Allen March 12, 2001 Declaration, Exhibit C, page two, paragraph 2; also in court record as Appendix 3 to Notice of Removal filed February 22, 2001).[3]

The Foundation is in default of its obligation to purchase the Creede Branch from Union Pacific and the sale of the right of way has thus not been consummated within the meaning of the STB's May 11, 1999 Decision (February 21, 2001 Affidavit of Creede Mayor B.J. Myers, paragraph 10).[4] Therefore, the current legal status of the right of way is that it is abandoned.

On November 7, 2001, after Mr. Shank and the Foundation had embarked on a series of disruptive overtures to try to take over real property lying in the abandoned right of way, the City of

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[3] *The Notice of Removal filed in this Court on the afternoon of February 22, 2001 erroneously states the STB has authorized the Foundation for "rail transportation of passengers. (Notice of Removal, page 2, line 14)" Neither the cited U.S. Code provision (49 U.S.C. §10904) nor the STB's May 11, 1999 Decision provide for transportation of passengers by the Foundation and any passenger transportation would, in fact, be outside the jurisdiction or competence of the STB. (C.f. 49 U.S.C. §24101). The word "passenger" is not found in either the STB's May 11, 1999 Decision or in 49 U.S.C. §10904. The only rail activity the Foundation has done anything to promote, a nostalgic, steam-powered, narrow gauge, intrastate tourist train, would not be subject to STB jurisdiction in any event.*

[4] *The February 21, 2001 B.J. Myers affidavit is attached to the state court motion seeking to take Mr. Shank's deposition.*

Creede filed suit in state court to obtain a declaratory judgment that the City's residential zoning was applicable to ***non-railroad-related*** land situated in the City of Creede. The land to which such zoning is applicable, and the only land to which it is applicable, is specifically defined in Exhibit A to the Ed Hargraves affidavit, filed contemporaneously with this Motion to Remand (Affidavit of Ed Hargraves dated March 8, 2001, paragraphs 10 and 11 and Exhibit A). All of this land is situated in Section 36 of Township 42 North, Range 1 West of the New Mexico Principal Meridian, a section of school land owned by the State of Colorado and administered by the Colorado State Land Board (March 8, 2001 Hargraves Affidavit, paragraph 6). The Board's lease to the Foundation's predecessor, the Denver & Rio Grande Western Railroad, has expired (March 8, 2001 Ed Hargraves Affidavit, paragraph 7).

The operative language of the state court filing (the November 7, 2000 Complaint now before this Court) states with unmistakable clarity that this suit is ***not*** applicable to any land used, needed or required for railroad operation. Quoted below is paragraph 12 of the Complaint:

> 12. This Court should enter a declaratory judgment, pursuant to C.R.S. §13-15-101, *et seq.* and Rule 57 of the Colorado Rules of Civil Procedure, declaring the following:
>
> That Creede's 1972 residential zoning is in full force and effect with respect to that land in South Creede as to which Defendant Foundation has certain rights to carry out freight railroad activities, with regard to all land in South Creede as to which no freight railroad activities or activities directly related to freight railroad activities are being carried on. The Declaratory Judgment should specifically state that with respect to all lands in South Creede not directly used for freight railroad activity or freight railroad-related activity, Creede's residential zoning, enacted in 1972, is in full force and effect and that Defendants have no right to carry out any activity or make any third-party commercial speech representation that they have any right, claim or basis to carry out non-railroad-related activities on such land.

The prayer for relief adopts the above-quoted paragraph 12 of the Complaint as the relief sought in this action.

Both the March 8, 2001 Ed Hargraves Affidavit and the March 9, 2001 B.J. Myers affidavit, both filed contemporaneously with this motion, establish that the land to which this suit is applicable, the non-railroad land lying beyond the 25 foot clear space containing the tracks and side clearance for the tracks, ***is not now being used for railroad-related purposes or activities and has never, in a span of over 110 years, been used for any railroad activity*** (Hargraves affidavit, paragraph 8, Myers affidavit, paragraph 12). No train has run over that land in the past three decades and no railroad activity is visible on that land (Hargraves Affidavit, paragraph 5 and 13, Exhibit B, pages 1-37 [photographs]; March 9, 2001 B.J. Myers affidavit, paragraphs 4 and 12).

Discussion

1. **There Is No Federal Question Before This Court.**

A. ***No Factual Basis For Federal Jurisdiction.***

The plaintiff City of Creede freely concedes that a dispute challenging use of the right of way for operation of interstate rail service, as potentially authorized by the STB in its May 11, 1999 Decision, would be outside the jurisdiction of the state court in which this case was filed.

But, as the Complaint makes clear, this is a suit relating to applicability of Creede's 1972 zoning to the ***non-railroad–related land*** lying within the historic Denver & Rio Grande Western right of way. This suit has absolutely nothing to do with any railroad-related activity in the right of way. That there is such land, and that it is truly outside any arguable need or use by the Defendants is established beyond credible denial or dispute. The land marked in green on Exhibit A of the

Hargraves affidavit was not used for any railroad purpose in the 110 years preceding the STB's May 11, 1999 Decision and it has not been used or attempted to be used for any railroad purpose by Mr. Shank's Foundation at any time since May 11, 1999.[5]

Thus the unrebutted and uncontrovertible cardinal fact before this Court is that the land to which this suit ***is*** applicable, the area marked in green on Exhibit A to the March 8, 2001 Ed Hargraves affidavit, is not now used or needed for any railroad-related purpose and has never been used or needed for any railroad-related purpose.

It is basic federal jurisprudence that for a case to be the proper subject of removal under 28 U.S.C. §1441, it must be a case which could have been initiated in the federal court. Removal rights cannot be created by counterclaim or by extraneous material or allegations found in the removal notice but not contained in the Complaint.

While this case involves application of Creede's zoning to land lying on a railroad right of way, it does not pertain to land which has any relationship (other than physical proximity) to use of that right of way for railroad purposes.

B. ***The Surface Transportation Board's Final Decision In The <u>Borough Of Riverdale</u> Case Recognizes That The Contours Of Preemption Do Not Extend To Non-Railroad-Related Land Uses.***

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[5] *While not directly stated in the affidavits supporting this Motion, it is this Writer's understanding that none of the eviction notices or criminal proceedings for interference initiated by Mr. Shank pertained to occupancy or purported criminal activity on parts of the right of way lying in Section 36 and south of Fifth Street [the area marked in green on Exhibit A to the Hargraves Affidavit to which Creede's residential zoning, and therefore, this litigation, is applicable]. The criminal charges of claimed disturbance sought by Mr. Shank against several Creede residents who were demonstrating against Mr. Shank's proposed steam-powered narrow gauge tourist train were ultimately dismissed as unfounded.*

The Defendant's Removal Notice was filed on the afternoon of Thursday, February 22, 2001. The following day the Surface Transportation Board issued its final decision in *Borough Of Riverdale - Petition For Declaratory Order - The New York Susquehanna And Western Railway Corporation,* STB Finance Docket No. 33466.[6] In its Final Decision in the *Riverdale* case, the STB established a bright line for determination of the contours of preemption under the Interstate Commerce Commission Termination Act of 1995 (ICCTA), 49 U.S.C. §10501(b).

The bright line drawn by the STB is couched in terms of function, not real estate. The bright line established by the STB establishes that there are uses of railroad properties or railroad rights of way in close proximity to preempted STB-regulated railroad uses (which ***are*** subject to the STB's regulatory and conditioning authority and are therefore preempted under the ICCTA) which are not pre-empted and which can be the subject of local actions enforced in local courts.

The close analysis made by the STB of examples of non-preempted gives this Court guidance as to whether the issues raised in this litigation go to STB-regulated activity (which we concede is clearly subject to the preemption clause of the ICCTA, 49 U.S.C. §10501(b) or to activity lying outside the boundaries of STB regulation (and therefore not preempted and not implicative of federal jurisdiction under 28 U.S.C. §1331).

Let us examine the STB's review of non-preempted right of way uses in the *Riverdale* case. Three judicial decisions (two in federal district courts; one in state court in New Jersey) reviewed

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[6] *A copy of the February 23, 2001 Decision in* Riverdale *is attached to this Memorandum Brief.*

and interpreted by the STB in *Riverdale* are of critical importance to this Court's disposition of the instant motion to remand. We quote from the STB's final Decision in *Riverdale:*

> In *Flynn v. Burlington Northern Santa Fe Corp.*, 98 F. Supp. 2d 1186 (E.D. Wash. 2000), the court similarly recognized Congress' intent in the ICCTA to preempt local permitting requirements with respect to railroad operations, but ***it found that the railroad would have to comply with local codes for electrical, building, fire, and plumbing when building a refueling facility, unless the codes restrict the railroad from conducting its operations or unreasonably burden interstate commerce.***
>
> In *Village of Ridgefield Park v. New York, Susquehanna & Western Ry.*, 750 A.2d 57 (N.J. 2000), the court found that section 10501(b) preempted local zoning regulations and precluded the state court from adjudicating common law nuisance claims involving noise and air pollution from a railroad maintenance facility. The court further found that, while the locality could not require permits prior to construction, ***the railroad must notify the local government "when it is undertaking an activity for which another entity would require a permit." The court determined that, generally, localities may enforce their local fire, health, plumbing, safety, and construction regulations and that the railroad may not deny the local government access for reasonable inspection of its maintenance facility. Moreover, the court concluded that the railroad could be required to furnish its site plan to the local government.***
>
> * * *
>
> *** [t]he court in *Florida East Coast Ry. v. City of West Palm Beach*, 110 F. Supp. 2d 1367 (S.D. Fla. 2000), determined that a city could apply its zoning and licensing regulations to a facility that, although owned by a railroad, is not used in rail transportation but rather by the railroad's lessee, a building materials company. (Emphasis Added).

In addition to the three cases referenced in the above quotation, the STB, in *Riverdale,* also referenced its own decision in *Township of Woodbridge, NJ, et al. v. Consolidated Rail Corporation, Inc.*, STB Docket No. 42053 (STB served Dec. 1, 2000), stating:

> In Township of Woodbridge, NJ, et al. v. Consolidated Rail Corporation, Inc., STB Docket No. 42053 (STB served Dec. 1, 2000), we expressed our view that a town may seek court enforcement of two noise abatement agreements that the town had entered into with a railroad, notwithstanding the broad sweep of the statutory preemption provisions. We explained that the railroad had voluntarily entered into the agreements, and thus ***the preemption provisions should not be used to shield the carrier from its own commitments. Rather, because "[these voluntary agreements must be seen as reflecting the carrier's own determination and admission that the agreements would not unreasonably interfere with interstate commerce" (slip op. at 5), we declined to undercut them*** (Emphasis Added)

When the STB's own analysis, as set forth in the above quotations, is applied to the facts before this Court, only one conclusion can be reached: if the land use at issue is unrelated to railroad activity and if application of the local land use or public safety regime will not interfere with either interstate railroad operations or the STB's mandate for regulation and administration of railroad use, then there is no preemption under the ICCTA and thus no basis for federal jurisdiction.

Here the City of Creede filed a state court case articulating the City's need to apply its own 1972 residential zoning code to residential land on the right of way in an area which is not now being used for rail purposes, has not been used by the Defendant Foundation for ***any*** purpose and was never used for rail purposes at any time in the past by the railroads which are the predecessors of the Defendant Foundation.

For this state court case to be a proper subject of §1331 federal jurisdiction, it must implicate some federal statutory or constitutional interest. But no such interest exists.

Because Creede's application of its zoning to non-railroad-related land will not in any way impede, interfere with or otherwise affect interstate commerce, the Commerce Clause of the United

States Constitution is not implicated.

Furthermore, because Creede's application of its zoning to non-railroad-related use of non-railroad-related land will not in any way engage usages or issues arising under the ICCTA, the functions of the STB and the preemption mandated by the ICCTA in §10501(b)are not implicated.

Defendants, who have the burden of establishing a right to removal, articulate no grounds for removal other than the Commerce Clause and the STB's preemptive authority under §10501(b). Defendants do not, for example, claim that application of Creede's zoning to the part of the right of way they are not using and their predecessors have never used will in some fashion deprive them of federally protected civil rights under either the Fifth or Fourteenth Amendments to the Constitution or under the Civil Rights Act of April 20, 1871, ch. 22, §1, 17 Stat. 13, codified as 42 U.S.C. §1983.

2. Even If There Is Federal Jurisdiction, This Court Should Abstain.

For the reasons set forth above, Creede's position is that there is no federal jurisdiction. For there to be federal jurisdiction, there would have to be preemption and there is no preemption.

But even if this Court were to do something we do not believe it should do, which is to accept the Defendants' argument that because the land involved in this suit is on a right of way subject to federal rail regulation, there must therefore be at least concurrent (or, as Defendants contend, exclusive) federal jurisdiction, and therefore a removal right under 28 U.S.C. §1441.

We think that analysis is wrong. But even if it is right, this Court should abstain from exercise of federal jurisdiction on grounds of the *Younger* abstention doctrine.

The *Younger* abstention doctrine, arising from Justice Black's opinion for the Court in *Younger v. Harris, 401 U.S. 37 (1971)*arose in a criminal context and represents the clear rule by the

United States Supreme Court that federal jurisdiction cannot be invoked simply out of concern that a state court might not get it right in dealing with what may ultimately be a violation of Constitutional rights. In *Younger,* Justice Black articulated the principles of federalism and comity which require that federal courts defer to state courts and not enjoin or interfere with the regular operation of state courts:

> Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts. In 1793 an Act unconditionally provided: "[N]or shall a writ of injunction be granted to stay proceedings in any court of a state . . . ." 1 Stat. 335, c. 22, 5. A comparison of the 1793 Act with 28 U.S.C. 2283, its present-day successor, graphically illustrates how few and minor have been the exceptions granted from the flat, prohibitory language of the old Act. During all this lapse of years from 1793 to 1970 the statutory exceptions to the 1793 congressional enactment have been only three: (1) "except as expressly authorized by Act of Congress"; (2) "where necessary in aid of its jurisdiction"; and (3) "to protect or effectuate its judgments." In addition, a judicial exception to the longstanding policy evidenced by the statute has been made where a person about to be prosecuted in a state court can show that he will, if the proceeding in the state court is not enjoined, suffer irreparable damages. See Ex parte Young, 209 U.S. 123 (1908). 3
>
> The precise reasons for this longstanding public policy against federal court interference with state court proceedings have never been specifically identified but the primary sources of the policy are plain. One is the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable [401 U.S. 37, 44] injury if denied equitable relief. The doctrine may originally have grown out of circumstances peculiar to the English judicial system and not applicable in this country, but its fundamental purpose of restraining equity jurisdiction within narrow limits is equally important under our Constitution, in order to prevent erosion of the role of the jury and avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted. This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of "comity," that

is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of [401 U.S. 37, 45] our Union of States, occupies a highly important place in our Nation's history and its future.

This brief discussion should be enough to suggest some of the reasons why it has been perfectly natural for our cases to repeat time and time again that the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions. In Fenner v. Boykin, 271 U.S. 240 (1926), suit had been brought in the Federal District Court seeking to enjoin state prosecutions under a recently enacted state law that allegedly interfered with the free flow of interstate commerce. The Court, in a unanimous opinion made clear that such a suit, even with respect to state criminal proceedings not yet formally instituted, could be proper only under very special circumstances:

"Ex parte Young, 209 U.S. 123, and following cases have established the doctrine that when absolutely necessary for protection of constitutional rights courts of the United States have power to enjoin state officers from instituting criminal actions. But this may not be done except under extraordinary circumstances where the danger of irreparable loss is both great and immediate. Ordinarily, there should be no interference with such officers; primarily, they are charged with the duty of prosecuting offenders against the laws of the State and must decide when and how this is to be done. The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate

protection." Id., at 243-244.

3. Exercise Of Federal Jurisdiction Would Violate The Anti-Injunction Act, 28 U.S.C. §2283.

The *Younger* court held that it need not reach the question of application of the Federal Anti-Injunction Act, 28 U.S.C. §2283, because its ruling mandating abstention meant that the issue of violation of the Anti-Injunction Act need not be reached.

For the same reason, we believe this Court need not necessarily consider application of the Anti-Injunction Act. But if this Court does not remand and does not abstain, this Court will be compelled to consider whether federal jurisdiction can be invoked, as it has been here, to thwart what looked to be in imminent state ruling that Mr. Shank would have to give his deposition.

Let us examine the timing. This suit was filed on November 7, 2000 and the Defendants were notified but not served (for two reasons: this writer was out of the United States until late in November and then did not want to serve papers which would require a response during the holiday period when it is difficult for any party to engage counsel to take on a new matter) immediately upon filing and provided with a courtesy copy.

Defendants were served on January 25, 2001 and filed an Answer in state court on about February 13, 2001.

Then we sought leave to take Mr. Shank's deposition under circumstances where he was threatening to evict retired persons from the right of way north of Section 36 and where it was manifest that the Foundation's activities were related to fund raising, to disruption of Creede's orderly real estate market, to promotion of some sort of steam-powered narrow gauge tourist train

but not to interstate transportation of goods moving by rail and where it appeared and continues to appear that Mr. Shank has defaulted on consummation of purchase of the right of way.

To avoid a state court ruling that he give his deposition, Mr. Shank's counsel removed the case to this Court, forcing Creede to deal with removal issues.

The Anti-Injunction Act exists to protect state jurisdiction and to prevent exactly what has happened here: a removal made for purposes of expediency to avoid a state court order that a deposition be given.

The Anti-Injunction Act is enforceable and the *Rooker-Feldman* doctrine (See *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923) makes it clear that it is applicable to circumstances such as those now confronting this Court.

Conclusion

For the reasons set forth above, this Court should remand this case to the District Court for Mineral County, Colorado.

Respectfully submitted,

GEORGE M. ALLEN
Counsel for Plaintiff City of Creede

CERTIFICATE OF SERVICE

I hereby certify that I have at Omaha, Nebraska, this 12th day of March, 2001, served a true copy of the documents denominated below on the parties and/or counsel listed below by the means of service shown below:

Documents Served

MOTION TO REMAND THIS ACTION
TO THE DISTRICT COURT FOR MINERAL COUNTY, COLORADO

DECLARATION OF GEORGE M. ALLEN

MEMORANDUM BRIEF IN SUPPORT OF MOTION

Means of Service

( ) facsimile
( ) Email
(x) U.S. Mail, Postage Prepaid
( ) Overnight Courier
( ) Hand Delivery

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George M. Allen

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 01-B-0318

CITY OF CREEDE, a Colorado Municipal Corporation,

Plaintiff,

v.

DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION, a Colorado Not-For-Profit Corporation,

and

DONALD H. SHANK,

Defendants.

REPLY IN OPPOSITION TO MOTION TO REMAND

Pursuant to this Court's Minute Order dated March 13, 2001, Defendants DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION ("the Foundation") and DONALD H. SHANK ("Mr. Shank") hereby submit their response in opposition to the Motion to Remand filed by The City of Creede, Colorado (the "City") on or about March 13, 2001.

SUMMARY OF LEGAL GROUNDS REQUIRING DENIAL OF THE MOTION TO REMAND

The City's Motion to Remand should be denied as a matter of law because this Court clearly has federal question jurisdiction over the case. This Court has federal question jurisdiction over the case because:

1. ***The Issue of Whether Application of the City's Zoning Law to the Foundation's Right-of-Way Land is Preempted by 49 U.S.C. § 10501(b) is a Federal Question Within the Meaning of 28 U.S.C. § 1331.*** *See Norfolk Southern Ry. v. City of Austell*, 1997 U.S. Dist. LEXIS 17236 at 24; No. 1: 97-CV-1018-RLV (ND, Ga., 1997) ("*Austell*"); *Florida East Coast Ry. v. City of West Palm Beach*, 110 F.Supp.2d 1367, 1374-1376; 2000 U.S. Dist. LEXIS 15911 at 18-27 (SD, Fla., ND 2000) ("*West Palm Beach*"); and *Soo Line R. Co. v. City of Minneapolis*, 38 F.Supp.2d 1096, 1101; 1998 U.S. Dist. LEXIS 22119 at 13-14 (D, Minn., 1998) ("*Minneapolis*"); *see, also*, the following cases in which U.S. District Courts exercised Federal-question subject matter jurisdiction in determining whether local laws other than zoning and land use laws were preempted by virtue of 49 U.S.C. § 10501(b): *Wisconsin Central Ltd. v. City of Marshfield*, 2000 U.S. Dist. LEXIS 10570; No. 99-C-0636-S (WD, Wisc., Feb. 10, 2000); *Burlington Northern Santa Fe Corp. v. Anderson*, 959 F.Supp. 1288 (D, Mont., 1997); and *CSX Transp. Inc. v. Georgia Public Service Com'n*, 944 F.Supp. 1573 (ND Ga., 1996).[1]

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[1] The Court in *Flynn v. Burlington Northern Santa Fe Corp.*, 98 F.Supp.2d 1186, 1192; 2000 U.S. Dist. LEXIS 10727 at 19 (ED, Wash., 2000), held that because 49 U.S.C. § 10501(b) places exclusive jurisdiction over railroad transportation in the Surface Transportation Board (STB), U.S. District Court Federal-question jurisdiction was thereby abrogated, citing *Pejepscot Indus. Park, Inc. v. Maine Central Railroad Co.*, 59 F.Supp.2d 109, 114 (D, Me., 1999). However, on appeal, the District Court decision in the *Pejepscot* case was reversed on that point. *Pejepscot Indus. Park, Inc. v. Maine Central R. Co.*, 215 F.3d 195, 204-205; 2000 U.S. App. LEXIS 14545 at 26 (1st Cir. 2000), viz.:

> . . . The thrust of the preemption statute is to federalize these disputes, not to deprive the Federal courts of jurisdiction . . . .

Consequently, *Flynn* is not good law on the point, and the *Pejepscot* case is Court of Appeals authority for the proposition that the issue of Federal preemption under 49 U.S.C. § 10501(b) is a Federal question over which the U.S. District Courts have subject matter jurisdiction.

2. ***The Issue of Whether the City's Zoning Law Can Lawfully be Applied in a Manner That Would Not Interfere With the Foundation's Exclusive Possession and Use of its Right-of-Way Land is a Federal Question Within the Meaning of 28 U.S.C. § 1331.*** *See Midland Valley R. Co. v. Sutter*, 28 F.2d 163, 167-168; 1928 U.S. App. LEXIS 2338 at 16-18 (8th Cir. 1928) ("*Midland Valley*"); accord: *Continental Oil Co. v. Chicago & North Western Ry. Co.*, 148 F.Supp. 411, 417 (D, Wyo., 1957); *see, generally*, "Pipes, Wires and Bicycles", 27 Ecology Law Quarterly 351, 397-402, *Exclusivity of Railroad Easements* (Wright and Hester, Boalt Hall School of Law, U. of Calif., Berkeley, CA, 2d Q., 2000).

Where an action removed to Federal Court is shown to involve a Federal question, the Federal Court's subject matter jurisdiction over that action is mandatory, so that the Court has no discretion to remand the action to state court. *Buchner v. Federal Deposit Insurance Corp.*, 981 F.2d 816, 820-821; 1993 U.S. App. LEXIS 990, at 15 (5th Cir. 1993) ("*Buchner*"); *Brockman v. Merabank*, 40 F.3d 1013, 1017; 1994 U.S. App. LEXIS 32283 at 10 (9th Cir. 1994) ("*Brockman*"). Inasmuch as the City of Creede's action presents one or more federal questions, this Court's subject matter jurisdiction over that action is mandatory. Consequently, the City's Motion to Remand the action to state court must be denied.[2/]

ARGUMENT

The sole issue presented by the Motion to Remand is whether this Court has subject matter jurisdiction over the complaint.[3/] The dispositive issue is whether the complaint involves a

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[2/] The City's arguments on abstention and the Anti-Injunction statute are insubstantial and frivolous. *See infra*, at 12-14.

[3/] The City does not allege any other defect in the Notice of Removal, such as (continued...)

Federal question. Resolution of the Motion to Remand turns on whether either of the following issues presented by the complaint is a federal question: (1) whether the City's zoning and land use laws are preempted by 49 U.S.C. § 10501(b); and (2) whether application of the City's zoning and land use laws as against a federally authorized rail common carrier would violate the Commerce Clause of the U.S. Constitution.

The City's Motion to Remand does not address that dispositive jurisdictional issue. Instead, the City sidesteps that issue by arguing the merits of its claim that the City's zoning laws should not be preempted by Federal law under the specific circumstances of this case. (Memorandum Brief in Support of Motion to Remand [hereinafter "Brief"] at 4-9). The City argues that because state law allegedly would not be preempted on the merits of this case, there is no basis for Federal jurisdiction, and the matter should be remanded to state court (e.g., *id.* at 8: "there is no preemption under the ICCTA and thus no basis for federal jurisdiction").

The City has the issues backwards. The subject matter jurisdiction of a Court is to be determined before the merits are decided, not, as alleged by the City, after the federal court has determined, on the merits, that state law will not be preempted by federal law in the specific circumstances.

The issue of whether the City's zoning and land use laws are preempted under 49 U.S.C. § 10501(b) is no less a federal question now than it would be were this Court later to determine on the merits that there is no preemption or that preemption were to apply. This principle is illustrated clearly in the *West Palm Beach* case. In that case, the municipal zoning law, evaluated

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[3/](...continued)
untimely filing.

on the merits of the case, was held not to have been preempted by federal law. There was no question, however, that the United States District Court in that case had federal question jurisdiction to make that determination on the merits. That is because the issue of preemption is, itself, a federal question giving the United States district court jurisdiction. The ultimate resolution of a case on the merits has no bearing on whether the Court has jurisdiction to resolve the issue in the first instance, as Plaintiff argues.

However, it is important that the facts that bear on the subject matter jurisdiction of this Court appear accurately in the record. *Hoge*, *supra*, 37 F.Supp. at 74 ("While it is the duty of the Federal court to hear evidence on the question of fraudulent joinder [subject matter jurisdiction], it is not the duty of the court to go into the merits of the case"). In that respect, the Affidavit of Donald H. Shank, filed as part of this Reply, establishes that sale of the involved right-of-way land to the Foundation for continued rail operation under 49 U.S.C. § 10904 has been consummated; that the Foundation has not defaulted on its payment for that right-of-way land; and that such right-of-way land has never been abandoned. This Court's federal-question subject matter jurisdiction attaches because the land at issue in this case is clearly shown to be part of the right-of-way of a federally-authorized common carrier by rail.

ARGUMENT

I. The Motion to Remand Must be Denied Because This Court Has Federal-Question Subject Matter Jurisdiction Over the Complaint

A. *The Issue of Whether the City's Zoning Law, as Applied to the Foundation's Right-of-Way Land, is Preempted by 49 U.S.C. § 10501(b) is a Federal Question*

Municipalities may generally zone land in furtherance of legitimate objectives that are related to the health, safety, morals and general welfare of its citizenry. A city may not, however,

attempt to regulate land use and planning via local laws where Congress's intent to preempt such local laws is clear and manifest. *Austell, supra*, 1997 U.S. Dist. LEXIS 17236 at 17, n. 6.

Since 1996, as a result of the ICC Termination Act (ICCTA), Pub. L. No. 104-88, 109 Stat. 803, there has been an express preemption of state and local law in 49 U.S.C. § 10501(b) as applied to federally-authorized rail common carriers, *viz.*:

> . . . Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

For the purpose of determining whether a particular local law involves regulation of rail transportation so as to be preempted, the term "transportation" is defined broadly in 49 U.S.C. § 10102(9) to include:

> (A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and
>
> (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property;

The issue of whether a particular local law is preempted by virtue of 49 U.S.C. § 10501(b) is a federal question over which United States district courts have subject matter jurisdiction. U.S. district courts have exercised jurisdiction over preemption issues on numerous occasions without objection, including the application of zoning and land use laws such as are involved in the instant action.

For example, in *Austell, supra*, a federally-authorized rail common carrier filed an action in U.S. district court seeking a declaratory judgment that the City of Austell's zoning ordinances

and land use permitting requirements are preempted by 49 U.S.C. § 10501(b) (1997 U.S. Dist. LEXIS 17236 at 6-7). The Austell's local zoning and land use permitting laws would have been applied by the city to require the rail carrier to obtain a change in zoning before constructing a rail-truck transfer facility on a tract of land owned by the rail carrier in Austell. (*Id.* at 3-6). The U.S. district court asserted subject matter jurisdiction over that issue without objection, and issued the declaratory judgment that was sought. (*Id.* at 11-25).

In *West Palm Beach, supra*, a Federally-authorized rail common carrier filed an action in U.S. District Court for declaratory and injunctive relief, contending that actions by the City of West Palm Beach, Florida to enforce its zoning ordinance were preempted by 49 U.S.C. § 10501(b). (110 F.Supp.2d at 1372). West Palm Beach sought to enforce its zoning ordinance to require the rail carrier or its lessee to obtain a change in zoning in order for the lessee to continue to operate a distribution facility for aggregates on land owned by the rail carrier in the city. (*Id.* at 1370-1372). The U.S. district court asserted subject matter jurisdiction over the issue of preemption without objection, but determined that the local law was not preempted. (*Id.* at 1373-1379).

In *Minneapolis*, a federally-authorized rail common carrier filed an action in U.S. District Court for declaratory and injunctive relief, contending that the City of Minneapolis's denial of demolition permits for buildings in the carrier's rail yard in that city was preempted by 49 U.S.C. § 10501(b). (38 F.Supp.2d at 1097-1098). The permits were being held up by Minneapolis pending review by that city's Heritage Preservation Committee. (*Id.* at 1098). The U.S. district court asserted subject matter jurisdiction over the issue of preemption without objection, and

determined that the local permitting law was preempted on the facts of that case. (*Id.* at 1098-1101).

Finally, United States district courts have asserted subject matter jurisdiction, without objection, to determine whether particular state or local laws, *other than zoning and land use provisions*, are preempted by virtue of 49 U.S.C. § 10501(b), *viz.*:

(1) *Wisconsin Central Ltd. v. City of Marshfield, supra* (local eminent domain law);

(2) *Burlington Northern Santa Fe Corp. v. Anderson, supra* (local law governing elimination of freight station agents); and

(3) *CSX Transp. Inc. v. Georgia Public Service Com'n.* (local law governing elimination of freight station agents);

See, also, Pejepscot Indus. Park, Inc. v. Maine Central R. Co., supra (note 1 of this Reply).

In view of those numerous unchalleriged exercises of subject matter jurisdiction, it is well-established that the issue of whether a particular state or local law is preempted by 49 U.S.C. § 10501(b) is a federal question over which United States district courts properly exercise jurisdiction. This court should determine, as well, that the issue of whether the City's residential zoning law, as applied to the Foundation's right-of-way land, is preempted by 49 U.S.C. § 10501(b) is a federal question.

B. *The Issue os Whether the City's Zoning Law Can Lawfully be Applied in a Manner that Would Interfere with the Foundation's Exclusive Possession and Use of Its Right-of-Way Land is a Federal Question.*

Apart from the federal question of preemption, the issue of whether the City's residential zoning and land use laws can be lawfully applied in a manner that would not interfere with the Foundation's exclusive possession and use of its right-of-way land is a federal question.

For instance, in *Midland Valley, supra*, a federally-authorized rail common carrier had an easement over land for a railroad right-of-way that encompassed a width of 195 feet. (28 F.2d at 163). Entities claiming rights through the owner of the fee in the land attempted to enter upon the surface of that right-of-way to construct derricks and other structures on it in order to drill for oil and gas. The rail carrier sought an injunction to prevent them from doing so.

A United States district court, applying Kansas law in a diversity action, held that the defendants were entitled to drill for oil on the right-of-way land at points 50 feet or more from the center of the carrier's main line track. (*Id.* at 164). The United States court of appeals for the Eighth Circuit reversed, applying *federal law* in holding that the rail carrier was entitled to the exclusive possession and use of the entire width of its right-of-way, *viz.* (*Id.* at 167, 168):

> We are inclined to the view that the question is one of general jurisprudence, and that we are not bound to follow the Kansas decisions. An interstate commerce railway system adequate to the country's needs is today recognized to be a national necessity . . . (at 167)
>
> * * *
>
> In order to provide such a system, recognized safety measures must be followed in the maintenance of the roadbed and right of way. The railroad company is engaged in interstate commerce. It serves, not only residents of Kansas, but people generally throughout the country. It is enjoined to exercise a high degree of care by general law. In addition to this, it is subject to certain regulations and requirements by the Interstate Commerce Commission with reference to safety in the maintenance of its right of way and the operation of its trains. The basic reason for the majority rule is that exclusive possession is necessary to enable the railroad company to safely conduct its business and meet the duty of exercising that high degree of care which the general law and administrative rules enjoin upon it. In the performance of these duties, imposed by general law and a national administrative tribunal for the public welfare, it should not be hampered by interference through the use of its right of way by the owners of the servient estate, although such use might be justified under the principles announced in local decisions. The character, nature, and extent of the right of way granted in general terms depends upon the use to which it is to be devoted. It

> depends upon what the railroad company requires in order to properly operate its railroad over such right of way. The requirements of the railroad company in this respect are largely determined by the duties imposed upon it by general law. These duties require it to have the exclusive possession of its right of way. It follows, therefore, that the principles of general law rather than local decision should determine the character of the rights of way granted in the instant case. Regard for the welfare of the public, the patrons, and the employees of the railroad company, in our opinion, compels such a conclusion (at 168, emphasis added).

Midland Valley remains good law on that point today. *See* "Pipes, Wires and Bicycles," *supra*, 27 Ecol. L. Quart. at 401-402 ("Besides being the majority view, and more in line with the nature of the railroad easement in light of its public carrier duties, the court in *Sutter* [*Midland Valley*] effectively nullified the minority rule with regard to interstate carriers, at least, under a theory of federal preemption [footnote omitted]" [at 401]).

In light of the *Midland Valley* ruling, the instant action clearly raises a federal question under the Commerce Clause of the United States Constitution as to whether the City's residential zoning and land use laws can be applied in a manner that would not interfere with the Foundation's right to exclusive possession and use of its right-of-way land.

C. Where a Removed Action is Shown to Involve a Federal Question, the Federal Court's Subject Matter Jurisdiction Over that Action is Mandatory, so that the Court Does Not Have Discretion to Remand the Action to State Court.

As shown in Sections IA and IB of this Response, the instant action raises two important federal questions, i.e., (1) whether the City's residential zoning law, as applied to the Foundation's right-of-way land, is preempted under 49 U.S.C. § 10501(b) (Supremacy Clause of the U.S. Constitution); and (2) whether that zoning law can be applied in such a manner so as not to unlawfully interfere with the Foundation's exclusive possession and use of its right-of-way land (Commerce Clause of the U.S. Constitution).

Where an action that has been removed to federal court involves federal questions, the United States District Court's subject matter jurisdiction is mandatory. The Court has no discretion to remand the action to state court. In *Buchner, supra*, the court of appeals said (981 F.2d at 821):

> . . . the district court has subject matter jurisdiction over all of the Buchners' claims against the FDIC by virtue of 12 U.S.C. § 1819(b)(2)(A) and 28 U.S.C. § 1331 . . . As all of the Buchners' claims against the FDIC are treated as arising under the laws of the United States, the district court's subject matter jurisdiction over those claims is mandatory so it has no discretion to remand them to state court. For the foregoing reasons, the district court's order remanding this case to state court is REVERSED.

Accord: Brockman, supra.

Inasmuch as the City's Complaint raises one or more federal questions, this Court's exercise of subject matter jurisdiction over this action is mandatory.

II. The Case Cannot Lawfully be Remanded on the Basis of Federal Abstention

The City's second argument -- that this Court should abstain from exercising its subject matter jurisdiction over the action pending state court action in the matter -- is procedurally and substantively defective.

Remand of a suit after removal to federal court is controlled by 28 U.S.C. § 1447(c). Discretionary reasons for remand not authorized by the statute are not a proper basis for remand. *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 342-345 (1976). Where removal is held to be appropriate, a proper federal jurisdictional basis has been established, and all non-jurisdictional requirements have been satisfied. *A discretionary exercise of the doctrine of abstention is not a proper basis for remand. Ryan v. State Bd. of Elections*, 661 F.2d 1130, 1133-34 (7th Cir. 1982).Remand based on the doctrine of abstention is not an option. Where an

action has been removed from state court to federal court, there is no state court proceeding toward which a federal court could show deference under the doctrine of abstention. In order to bring abstention appropriately into issue, a party desiring to be in state court would have to ask the federal court to stay the federal proceeding under the doctrine of abstention to allow that party to institute an appropriate state court action. *See Adams v. ARDC*, 600 F.Supp. 390, 393-394, 1984 U.S. Dist. LEXIS 21529 at 8 (ND, Ill., 1984), aff'd 801 F.2d 968 (7th Cir. 1986) ("*Adams*"). The City's abstention argument is procedurally defective because the City has not filed a motion with this Court for a stay of the federal court proceeding in deference to a pending state court proceeding or to initiate one.

Any such request for stay would be substantively unwarranted in any event. Abstention is not an appropriate basis for this Court to ignore the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them". *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976). Abstention is a narrow exception to the duty of a federal court to adjudicate a controversy before it and is justified only in exceptional circumstances. *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-189 (1959). Such exceptional circumstances are not present in the instant action.

In particular, *Younger* abstention (which takes its name from *Younger v. Harris*, 401 U.S. 37 [1971]), as cited by Plaintiff, would not be an appropriate basis for this Court to abstain from exercising its subject matter jurisdiction over the complaint. There is no basis for *Younger* abstention where, as here, the questions in the case are exclusively matters of federal law. *Adams, supra*, 600 F.Supp. at 394-395, 1984 U.S. Dist. LEXIS 21529 at 10-14; aff'd. 801 F.2d at 970, note 2. Certainly, nothing in the lengthy quote from the *Younger* case at pages 10-12 of the

Motion to Remand suggests anything to the contrary. Abstention is thus procedurally inappropriate and substantively unwarranted in the context of ruling on the Motion to Remand pending before this Court.

III. The Anti-Injunction Act is Not Applicable.

The City's final argument -- that exercise of federal jurisdiction would violate the Anti-Injunction Act, 28 U.S.C. § 2283 -- is frivolous.

The Anti-Injunction Act prohibits a United States district court from granting an injunction to stay proceedings in a state court except as expressly authorized by an Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. 28 U.S.C. § 2283.

As the City well knows, this Court did not grant an injunction to stay proceedings in the state court. It was not necessary for this Court to do so. The action was removed to this Court from state court based on federal question jurisdiction. The removal statute -- 28 U.S.C. § 1446(d) -- explicitly provides that upon removal of the case from the state court to this Court, "the State court shall proceed no further unless and until the case is remanded." That is to say that in a removal setting, the stay of state court proceedings is statutory without injunctive action by the federal court. Consequently, removal in and of itself cannot result in a violation of the Anti-Injunction Act.[4]

---

[4] Removal was not involved in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923), cited at page 13 of the Motion to Remand. No statute in that case provided automatically for a freeze of state court proceedings, as does 28 U.S.C. § 1446(d). It is not relevant, therefore, that removal in this case may have prevented the taking of Mr. Shank's deposition in state court on an accelerated basis. Removal would have been sought in this case whether or not the City had moved to take Mr. Shank's deposition in state court. Of course, discovery is available in this (continued...)

Consequently, this Court need not, and should not, consider the merits of Federal preemption or other Constitutional issues in ruling on the Motion to Remand. *Hoge v. Fort Smith Gas Co.*, 37 F.Supp. 71, 74 (W.D., Ark., Fort Smith Div., 1941) ("*Hoge*"). If that Motion were to be denied, Defendants intend to move this Court to refer those issues to the Surface Transportation Board (STB) for resolution on the merits under the doctrine of primary jurisdiction in order to utilize that agency's expertise on railroad right-of-way land, and in the interest of uniformity of decisionmaking. In the meantime, Defendants' silence should not be taken to imply agreement with any of the City's arguments on the merits.

CONCLUSION

WHEREFORE, for the reasons stated, the Motion to Remand should be denied.

Respectfully submitted,

RAYMOND P. MICKLEWRIGHT
WOLF & SLATKIN, P.C.
44 Cook Street, Suite 1000
Denver, CO 80206-5827
(303) 355-2999

Attorney for Defendants

April 2, 2001

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[4](...continued)
Court and, contrary to the City's allegation at page 3 of the Motion to Remand, note 2, discovery also is available at the STB if this Court were to see fit later on motion to refer issues to the STB under primary jurisdiction. (*See* 49 C.F.R. § 1114.21, *et seq.*).

CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2001, I served the foregoing document, Reply in Opposition to Motion to Remand, by first-class, U.S. mail, postage prepaid on the following:

George M. Allen 2080
206-A Society Drive
Telluride, CO 81435

W. Randolph Barnhart
Hillyard & Barnhart
7887 East Belleview Avenue
Suite 1200
Englewood, CO 80111

Raymond P. Micklewright

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 01-B-0318

CITY OF CREEDE, a Colorado Municipal Corporation,

Plaintiff,

v.

DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION, a Colorado Not-For-Profit Corporation,

and

DONALD H. SHANK,

Defendants.

AFFIDAVIT OF DONALD H. SHANK

1. My name is Donald H. Shank. I am President of Denver & Rio Grande Railway Historical Foundation ("the Foundation"). The Foundation and I are Defendants in the case before this Court. I have read the Motion to Remand and supporting materials filed by the City of Creede in this case. I have personal knowledge that many of the factual allegations made in support of that Motion are not true. For present purposes, I have been instructed by my attorney to confine my testimony to facts relating to consummation of the Foundation's acquisition of the Creede Branch, the current status of the Foundation's payments to Union Pacific for the Branch, and whether the Branch is abandoned.

2. Attached to this Affidavit as Appendix 1 is a copy of a letter from Robert T. Opal, General Commerce Counsel, Union Pacific Railroad Company, to Vernon A. Williams, Secretary, STB, dated May 24, 2000, advising the STB that sale of the Creede Branch to the Foundation was consummated on May 24, 2000. That advice by the Seller of the Branch conclusively refutes the inaccurate factual allegation at page 2 of the Memorandum Brief in Support of the Motion to Remand (the Brief) that sale of the involved right-of-way has not been consummated within the meaning of the STB's May 11, 1999 decision.

3. The Foundation is current in its obligation to purchase the Creede Branch from Union Pacific. Over 50 percent of the purchase price for the Branch has already been paid. There has been no default on the Promissory Note that was signed for the balance of the purchase price. The next payment under that Note is due on September 2, 2001. The current status of payments on that Note refutes the inaccurate factual allegation at page 2 of the Brief that the Foundation is in default of its obligation to purchase the Branch from Union Pacific.

4. The Creede Branch has never been abandoned. By virtue of an STB Decision issued May 11, 1999, copy of which was attached as Appendix 3 to the Notice of Removal, the exemption for abandonment of the Branch that was sought by Union Pacific was dismissed when sale of the Branch to the Foundation was consummated on May 24, 2000. That exemption thus never became effective. The foregoing refutes the inaccurate factual allegation at page 1 of the Brief that Union Pacific formally abandoned the Creede Branch on January 25, 1999, and the inaccurate allegation on page 2 of the Brief that the current legal status of the involved right-of-way is that it is abandoned.

5. The City has previously contended before the STB that the Creede Branch is abandoned. The STB rejected that contention in a decision issued May 24, 2000, a copy of which is attached to this Affidavit as Appendix 2.

Donald H. Shank

STATE OF COLORADO)
)
COUNTY OF La Plata)

SUBSCRIBED AND SWORN to before me this 23 day of March, 2001.

My Commission Expires: 11-12-2003

Notary Public

MELISSA BIRKBACH NOTARY PUBLIC STATE OF COLORADO

UNION PACIFIC RAILROAD COMPANY

Law Department

1416 DODGE STREET
ROOM 830
OMAHA, NEBRASKA 68179-0001
FAX (402) 271-5610

May 26, 2000

VIA FAX (202) 565-9002 and
UPS OVERNIGHT

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Docket No. AB-33 (Sub-No. 132X), Union Pacific Railroad Company -- Abandonment Exemption -- In Rio Grande and Mineral Counties, CO; Notice of Consummation of § 10904 Sale

Dear Mr. Williams:

This refers to the Board's decision dated May 11, 1999 authorizing the Denver & Rio Grande Historical Foundation (D&RGHF) to acquire the above line under 49 U.S.C § 10904. The decision also dismissed the abandonment exemption, effective on the date the sale is consummated.

This letter is to advise that the sale of the above line to D&RGHF was consummated on May 24, 2000.

An additional 10 copies of this letter are enclosed for the Board's files. Please indicate receipt by returning a stamped copy of this letter in the self-addressed, stamped envelope enclosed for this purpose.

Very truly yours,

Robert T. Opal

Robert T. Opal
General Commerce Counsel
Direct dial: (402) 271-3072
Fax: (402) 271-5610

cc: (via fax)
Thomas McFarland, Esq. [312-201-9695]
Donald Shank [970-~~596~~-0202]
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SERVICE DATE - MAY 24, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-33 (Sub-No. 132X)

UNION PACIFIC RAILROAD COMPANY--ABANDONMENT
EXEMPTION--IN RIO GRANDE AND MINERAL COUNTIES, CO

IN THE MATTER OF AN OFFER OF FINANCIAL ASSISTANCE

Decided: May 18, 2000

Union Pacific Railroad Company (UP) filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments and Discontinuances of Service and Trackage Rights to abandon and discontinue service over a 21.6-mile line of railroad known as the Creede Branch, extending from milepost 299.3 near Derrick to the end of the line at milepost 320.9 at Creede, in Rio Grande and Mineral Counties, CO. Notice of the exemption was served and published in the Federal Register on January 25, 1999 (64 FR 3740-41). Under 49 CFR 1152.50(d)(3), the exemption was scheduled to become effective on February 24, 1999, but formal expressions of intent to file an offer of financial assistance (OFA) were timely filed by the February 4, 1999 due date. OFAs were filed by the Denver & Rio Grande Railway Historical Foundation (D&RGHF or offeror) (to purchase or to acquire by donation the entire line), by South Fork-Creede Railway Corridor Preservation Group Inc. (SFCR) (to purchase the entire line), and by the Rio Grande & San Juan Railroad Co. (RG&SJ) (to purchase the entire line). These filings automatically stayed the effective date of the exemption until March 6, 1999.[1]

On February 4 and 19, 1999, RG&SJ and SFCR, respectively, filed petitions to toll the 30-day period for submitting their OFAs. By decision served February 23, 1999, the deadline to file an OFA was extended to March 26, 1999, and the effective date of the abandonment exemption was further postponed to April 5, 1999. On March 26, 1999, RG&SJ timely filed an OFA under 49 U.S.C. 10904 and 49 CFR 1152.27(c) to purchase the entire line for $302,000. Also on that date, D&RGHF filed a request to extend its due date to file an OFA for an additional 5 days. By decision served March 30, 1999, D&RGHF was granted an extension until March 31, 1999, to file its OFA, RG&SJ was found financially responsible, and the effective date of the exemption authorizing abandonment was postponed to permit the OFA process to proceed.

[1] See 49 CFR 1152.27(c)(2)(i).

On April 2, 1999, D&RGHF filed a petition for leave to file its OFA 2 days late and tendered an OFA to purchase the entire line for $387,930.[2] By decision of the Director of the Office of Proceedings, served April 6, 1999, D&RGHF's offer was accepted.[3] Moreover, it was determined that D&RGHF is financially responsible and, because there were two offers from financially responsible entities as a result of this determination, UP was directed to provide written notification of its selection of the offeror with which it wished to negotiate to the Board and all parties by April 12, 1999. On April 12, 1999, UP notified the Board that it had selected D&RGHF for negotiations with respect to the possible purchase of the line segment.

On April 14, 1999, pursuant to 49 CFR 1011.2(a)(7) and 49 CFR 1011.8(c)(2), RG&SJ appealed the April 6 decision, arguing that the Director had acted erroneously in accepting D&RGHF's offer and that it should be rejected. By a decision served April 22, 1999, RG&SJ's appeal was denied, but UP was directed to notify the Board by April 26, 1999, of a new selection of a negotiating party or to confirm its earlier selection of D&RGHF. UP subsequently confirmed its earlier selection of D&RGHF. On April 28, 1999, UP and D&RGHF advised the Board that the railroad and the offeror had reached an agreement for the purchase and sale of the rail line. By a decision of the Director of the Office of Proceedings served May 11, 1999, UP's abandonment exemption was dismissed, effective on the date the sale is consummated, and D&RGHF was authorized to acquire the subject rail line. On August 2, October 12, and November 22, 1999, and February 7, 2000, the parties notified the Board by letter that the closing date for the transaction had been postponed.[4] The latest postponement had extended the closing date to May 2, 2000.

On November 26, 1999, the City of Creede, CO (City), filed a letter-protest in opposition to the proposed sale. D&RGHF replied on December 1, 1999.[5]

---

[2] D&RGHF stated that, despite its best efforts, it was unable to finalize financial statements until April 2, 1999. D&RGHF urged the Board to accept its late-filed OFA because UP would not be prejudiced by the acceptance.

[3] RG&SJ had earlier filed letters objecting to the 5-day extension (March 31) and urging the Board to reject D&RGHF's OFA (April 1 and 5).

[4] On October 8, 1999, RG&SJ filed a letter arguing that, because D&RGHF had failed to earlier consummate the acquisition, RG&SJ wished to pursue its OFA and commence negotiations with UP.

[5] In its reply, D&RGHF characterizes the City's filing as a petition to reopen an administratively final decision, and argues that the City has failed to make the showing of material error, new evidence, or substantially changed circumstances needed for such a petition to succeed. Although the City has labeled its filing as a protest, D&RGHF is correct that it is more properly considered as a petition to reopen an administratively final decision because the Board's May 11, 1999 decision approved the sale of the rail line to D&RGHF and dismissed UP's notice of

(continued...)

DISCUSSION AND CONCLUSIONS

In its filing, the City expresses its "protest, fears and concerns" regarding the sale of the line to D&RGHF.[6] The City suggests that UP cannot sell the line under 49 U.S.C. 10904 because it has already been abandoned under Colorado state law. The City also objects to D&RGHF's proposed sharing of a rail depot, now being used by the City's historical society, and expresses concern regarding the effect this use would have on public parking and its events center and playground. The City fears that an active rail line will necessitate the construction of a new turnaround spur on the site of the City's newly constructed ballpark, and the City says it is concerned that a section of street rerouted to alleviate drainage problems may also be affected. Moreover, the City questions D&RGHF's financial ability to buy and operate the line. Finally, the City makes reference to "Rails to Trails" legislation[7] and questions why it should abandon its current public uses of the rail property to accommodate an active rail line.

In response, D&RGHF disputes the City's characterization of D&RGHF's plans and the assumptions as to the governing law which underlie the City's protest. In support, D&RGHF attaches a letter from UP addressing legal issues and a statement by Donald H. Shank, President and Chairman of the Board of D&RGHF. Mr. Shank claims that the City has turned to a tourist-based economic philosophy since the last area mines closed in the 1980s. He asserts that the City would benefit from the sale of the Creede Branch. He claims that it was never D&RGHF's intent to construct a spur on the site of the City's ballpark, and that all drainage issues will be worked out. Mr. Shank further contends that D&RGHF has not asked the City to give up its events center and argues that this transaction has nothing to do with the Trails Act. UP rejects the City's claim that UP has lost title to the line and abandoned it under state law.

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[5](...continued)
exemption upon consummation of the sale. See 49 CFR 1115.4, 1152.25(e)(2) and (4), and Consolidated Rail Corporation--Abandonment Exemption--In Bergen & Passaic Counties, NJ, STB Docket No. AB-167 (Sub-No. 1151X) (STB served Oct. 30, 1997) (Bergen & Passaic Counties).

D&RGHF also notes that the City has not heretofore participated in this proceeding and has not explained or justified its failure to have timely participated or why it is only now filing its "protest." As such, the railroad argues, the City's filing is fatally untimely. However, our Rules of Practice state that a person may file a petition to reopen an administratively final action at any time. 49 CFR 1115.4. Thus, the City's petition is within our rules and will be evaluated on its merits.

[6] By letter filed December 22, 1999, the Board of County Commissioners of Mineral County, CO, lends its support to the City.

[7] The City evidently is referring to Section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), whose purpose is to preserve rail corridors for possible reactivation of rail service by permitting their interim use as recreational trails. See Preseault v. ICC, 494 U.S. 1 (1990) (Preseault); 49 CFR 1152.29.

Under our abandonment rules, a petition to reopen an administratively final action must state in detail whether there is material error, new evidence, or substantially changed circumstances to warrant reopening the proceeding. See, e.g., Bergen & Passaic Counties and 49 CFR 1152.25(e)(4). Although not totally clear from its submission, the City is apparently alleging material error here by suggesting, contrary to the Board's findings, that D&RGHF is not financially responsible, that the Creede branch has been abandoned under state law, and that continued rail use should not be allowed over the line.

1. Financial Responsibility. The City asserts that D&RGHF is not financially responsible. In support, the City points to an October 1999 newspaper article indicating that an anonymous businessman would finance a portion of the purchase of the line. Based on this article, the City questions the ability of D&RGHF to buy, restore and operate the corridor. The City does not, however, offer any other evidence that D&RGHF lacks the funds to acquire and operate the line.

Where, as here, a finding is made that an offeror is financially responsible to fund the acquisition and operate the line for 2 years as required by 49 U.S.C. 10904(f)(4), its capability to conduct operations for 2 years is customarily presumed in the absence of persuasive evidence to the contrary. The City's newspaper article is not enough to show that we erred in finding D&RGHF financially responsible. Moreover, the financial responsibility of D&RGHF is not compromised by the fact that the purchase of the line is being financed in part with borrowed funds. See Bergen & Passaic Counties. The City's claims to the contrary are rejected.

2. State Law Abandonment. The City suggests that we lack jurisdiction to approve the sale of this line under 49 U.S.C. 10904 because it has allegedly already been abandoned under state law. According to the City, UP has removed its railroad facilities from Creede and abandoned its turnaround spur in South Creede. Allegedly, there has been no rail service to Creede since November 1969. Moreover, the City notes that the State of Colorado granted the railroad a new right-of-way in Creede by an agreement dated October 24, 1969, which prohibits the railroad from leasing to persons not railroad customers or for purposes not connected with railroad operations, or selling to persons without State approval. According to the City, violation of these provisions would terminate the agreement and it alleges that the railroad has done so. The City further argues that the railroad's violation of the right-of-way agreement with Colorado has resulted in UP's losing title to the Creede Branch and a common law abandonment of the line, preventing its sale to D&RGHF.

In response, D&RGHF provides a copy of a letter dated November 15, 1999, from UP to the Colorado State Attorney General's Office in which UP argues that no common law abandonment of the Creede Branch has occurred under Colorado law, and that UP and its predecessors have always retained the continuity of the line for rail use. Further, the offeror contends, the Board's jurisdiction preempts state law as to whether the line can be abandoned, and it points out that neither the Interstate Commerce Commission (ICC) nor the Board has ever granted abandonment authority for the subject line.

The City's arguments lack merit. As D&RGHF points out, it is well settled that the Board has exclusive and plenary authority over the abandonment of rail lines. Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 319-21 (1981); Phillips Co. v. Denver & Rio Grande Western R. Co., 97 F.3d 1375, 1376-78 (10th Cir. 1996), cert. denied, 521 U.S. 1104 (1997) (Phillips); Preseault, 494 U.S. at 9-10.

Although railroad operations ceased on the Creede Branch in November 1969, prior to UP's January 1999 abandonment notice, neither UP nor any of its predecessors sought or received abandonment authority from the ICC or the Board. However, ICC or Board authorization is necessary prior to a determination of abandonment, in light of the agency's plenary and exclusive authority under 49 U.S.C. 10903. E.g., Phillips. Additionally, our May 1999 decision simply provided for dismissal of UP's notice of exemption upon consummation of D&RGHF's purchase of the line via the OFA process. Moreover, the record before us does not indicate that common carriage rates have been canceled or that track and ties have been salvaged. Thus, the record supports the conclusion that the availability of the line for active rail use has consistently been maintained, that UP has never relinquished title to the line, and that the agency has retained jurisdiction over the line. As such, the City has failed to demonstrate material error on the Board's part in approving the sale of the line under 49 U.S.C. 10904.[8]

3. Trails Act. The City also invokes the Trails Act in support of its case. Noting that the law was enacted to preserve rail corridors for public use, Creede points out that it has used the trail corridor for public uses for 30 years, and argues that doing so reflects the intent of the Trails Act. The City asserts that the OFA would violate the intent of the legislation.

The City does not argue that the Trails Act applies here. Nor could it make such an argument as the line was never authorized to be abandoned prior to the exemption for abandonment in this proceeding. Moreover, the acquisition pursuant to the OFA in this proceeding takes precedence over any potential Trails Act acquisition. Rather, Creede appears to be citing the Trails Act in support of a policy argument to the effect that non-rail uses should be favored. However, the OFA statutory provisions, which do apply here, reflect a Congressional policy favoring continued rail use. Indeed, the purpose of the Trails Act is to preserve rail corridors by rail banking them to enable their future use as active rail lines. For these reasons, the City's public use/trail use argument cannot serve as a basis to reopen this proceeding.

---

[8] As to the City's assertion that there has been a common law abandonment here under Colorado state law, our exclusive and plenary jurisdiction in the abandonment area may not be circumscribed by a state agreement. Thus, whether UP has violated provisions of its 1969 right-of-way agreement with Colorado does not affect our continuing jurisdiction here. However, the City may, of course, bring a court action against the railroad for violation of the parties' contract and seek damages for any alleged breach thereof.

In sum, we find that the City has not satisfied any of the criteria necessary for reopening this administratively final proceeding. As such, we will deny its petition.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The City's petition to reopen is denied.

2. This decision is effective on its service date.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams
Secretary

(1-16)

STATE OF COLORADO
ANNUAL STATEMENT OF PROPERTY
2001 DECLARATION

COLORADO DIVISION OF PROPERTY TAXATION
STATE ASSESSED PROPERTY SECTION
1313 SHERMAN STREET, ROOM 419
DENVER, COLORADO 80203
PHONE : (303)866-3198
FAX : (303)866-4000
EMAIL : paul.simon@state.co.us

DUE APRIL 2, 2001

Please make changes to label if needed

Company Name : DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION

Type of State Assessed Company: RR
Railroad Company
FEIN or Social Security Number: 84-1433680

Contact / Dept. : DRG RAILWAY HISTORICAL FOUNDATION RR661
Street Address : 1474 MAIN AVENUE
Unit / Suite # : SUITE 223
City, State, Zip : DURANGO, CO 81301

Colorado Registered Agent
Name: DONALD (first) SHANK (last)

State of Incorporation: COLORADO
Year Colorado Operations Began: NOT OPERATING

Company Contact for this report:		Tax agent contact for this report: (Note 1)	
Name:	DONALD (first) SHANK (last)	Name:	Denise (first) Jackson (last)
Title:	PRESIDENT & EXEC. DIR.	Title:	Bookkeeping / Tax preparer
Phone:	970.259.9498	Phone:	(970) 247-3248
Fax:	970.259.0202	Fax:	(970) 247-3240
Email:	drghf@frontier.net	Email:	dj@frontier.net

DECLARATION

I declare under the penalty of perjury in the second degree that this statement, together with any accompanying exhibits or schedules, has been examined by me and, to the best of my knowledge, information, and belief, sets forth a full and complete list of all taxable property owned, in the possession or under the control of the reporting entity. I further declare that such property has been reasonable described with its value fairly represented, and that no attempt has been made to mislead the Property Tax Administrator as to its age, quality, or value.

(Signature) Donald H. Shank
(Name) DONALD H. SHANK
(Title) PRESIDENT & EXEC. DIR. (Date) MAY 14, 2001

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Note 1: If the reporting entity uses an agent to prepare or represent the reporting entity in matters related to this 2001 Annual Statement of Property, a letter of authorization signed by an officer of the reporting entity must be submitted as an addenda to this report.

GENERAL INSTRUCTIONS
ALL REQUESTED INFORMATION IS AS OF DECEMBER 31, 2000.
THIS IS A CONFIDENTIAL DOCUMENT

This report with all attachments must be postmarked on or before APRIL 2, 2001. Failure to file by April 2, 2001 results in a PENALTY OF $100 PER DAY, beginning April 3, 2001, unless an extension is granted. When an extension is granted, filing is due on or before May 1, 2001 and penalties start on May 2, 2001. The total penalty cannot exceed $3,000.

You must complete this report or an accurate facsimile. Complete reports must include all requested information for all pages. The only exceptions are: Page 2, the additional documents requested must be filed by May 1, and Page 6, for non-publicly traded companies. Incomplete pages will be returned for completion. Failure to complete and return these pages within seven days will result in the commencement of a $100 per day penalty and a Best Information Available valuation. The total penalty cannot exceed $3,000.

The following documents MUST BE FILED IN ADDITION to this report if applicable to the parent or reporting company:

(a) Balance sheet, income statement, statement of retained earnings and statement of cash flows.
(b) SEC Form 10-Ks, and 10-Qs if other than December 31, fiscal year end.
(c) Annual Report to Share/Stockholders,
(d) Annual Report(s) to the following agencies / commissions if required:
Surface Transportation Board

State the exact nature of the business activity of the REPORTING COMPANY in the State of Colorado:

CHARITABLE FOUNDATION OWNS 21.6 MILES OF RAILROAD FOR EVENTUAL OPERATION AS A TOURIST / FREIGHT LINE.

Describe any important changes which occurred during the previous calendar year such as major acquisitions, divestitures, write-offs and sales of major properties for both the REPORTING COMPANY and its ultimate Parent. Attach additional sheets as necessary:

REHABILITATION OF RIGHT-OF-WAY & TRACK STRUCTURE COMMENCED DURING SUMMER 2000 AND WILL CONTINUE DURING 2001 & 2002.

Is the REPORTING COMPANY a proprietorship, partnership, S corporation, corporation, association, joint venture, other?

NOT-FOR-PROFIT COLORADO CORPORATION.

Is the REPORTING COMPANY a subsidiary of another corporation? Yes (No)

What is the NAME of the ultimate PARENT company? SAME

Are securities of either the REPORTING or PARENT companies publicly traded?

Common Stock	Yes	(No)	Preferred Stock	Yes	(No)
Bonds	Yes	(No)			

If rate-base regulated, state the allowed rates of return. N/A

Equity: _____ Overall: _____ Rate Base at 12-31-2000: 164

Tax Agents must have a current letter of agency on file with the Division for each company represented.

Colorado Annual Statement of Property - 2001 D&RG RAILWAY HISTORICAL FOUNDATION
(Reporting Company Name)

INCOME STATEMENT

ACCOUNT TITLE	Parent Company 2000	Reporting Company System 2000	1999	1998	1997	1996
1 Railway operating revenues	Ø	Ø	Ø			
2 Railway operating expenses	Ø	Ø	Ø			
3 NET REVENUE FROM RAILWAY OPER.	Ø	Ø	Ø			
4 Income taxes on operating income	Ø	Ø	Ø			
5 Income from leased road and equipment	0	0	0	0	0	0
6 Rent paid for leased road and equipment	Ø	Ø	Ø			
7 **Net Operating Income (line 3 - line 4)**	Ø 0	Ø 0	Ø 0	0	0	0
8 Non-operating income			452,543			
9 Non-operating expenses			27,661			
10 Interest expenses						
11 Income before extraordinary items						

SIX YEAR REPORTING COMPANY SYSTEM NET OPERATING PROPERTY

ACCOUNT TITLE	31-Dec-00	31-Dec-99	31-Dec-98	31-Dec-97	31-Dec-96	31-Dec-95
Net Operating Property (Page 4, Line 9, Middle Column)	Ø	N/A	N/A	N/A	N/A	N/A

Colorado Annual Statement of Property - 2001 D+RG RAILWAY HISTORICAL FOUNDATION

BALANCE SHEET

	Parent Company	Reporting Company System	Reporting Company Colorado
ASSETS			
1 Road	624,616		
2 Construction work in progress			
3 Equipment	6,800		
4 Unallocated Items			
5 Inventories, materials and supplies (1)			
6 Accumulated depreciation and amortization			
7 **Net Road and Equipment**	$ 631,416 -	$ -	$ -
8 Road and equipment leased from others			
9 Road and equipment leased to others			
10 **Total (line 7+8-9) (sch 352A + line 5)**	$ 631,416 -	$ -	$ -
11 Current Assets (less materials and supplies)	151,621		
12 Investments and other assets	34,000		
13 All other depreciation and amortization	(972)		
14 **Total Assets**	$ 816,065 -	$ -	$ -

PROPERTY UNDER OPERATING LEASES

15 Original cost of leased property	N/A		
16 Net book value of leased property	N/A		
17 Lease payment	N/A		
18 Average age of leased property	N/A		
19 Average remaining life of leased property	N/A		

LIABILITIES AND EQUITY

20 Common stock and paid-in capital	~~441,449~~ error		N/A
21 Preferred stock			N/A
22 Retained earnings	441,449		N/A
23 Long-term debt due after one year	374,616		N/A
24 Long-term debt due within one year			N/A
25 Current and accrued liabilities			N/A
26 Total other liabilities			N/A
27 **Total Liabilities and Equity**	$ 816,065 -	$ -	N/A

(1) Includes inventories held for resale, and materials and supplies held for consumption.

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SCHEDULE OF LONG TERM DEBT - PARENT COMPANY

Rate of Debt	Maturity Date	Face Value	Outstanding Principal	Average Market Value Per $100	Market Value
INTEREST ONLY	20 YRS	100,000	100,000		
50% Balloon	50% 9-2-01	274,616	274,616		
	50% 5-2-07				
TOTALS			$374,616 -		$ -

Current Bond Rating: _____ S&P: _____ Moody's: _____

Total outstanding principal should agree with page 4, line 23, column 1.

SCHEDULE OF LONG TERM DEBT - REPORTING COMPANY

Complete schedule if reporting company's debt is not included above.

Coupon Rate of Debt	Maturity Date	Face Value	Outstanding Principal	Market Market Value Per $100	Market Value
TOTALS			$ -		$ -

Current Bond Rating: _____ S&P: _____ Moody's: _____

Total outstanding principal should agree with page 4, line 23, column 2.

If the bonds are publicly traded during the year please use the calendar year monthly average of outstanding bonds and their market values. If market value is derived by means other than listed quotation, explain how it was derived. Report all long term debt net of long term debt due within one year.

Attach additional sheets as necessary

NOT NECESSARY TO COMPLETE IF NON-PUBLICLY TRADED

SCHEDULE OF COMMON STOCK - PARENT COMPANY

Exchange _____ Symbol _____

N/A

Month	High Price	Low Price
January		
February		
March		
April		
May		
June		
July		
August		
September		
October		
November		
December		
TOTALS	$ -	$ -
Sum of High and Low Totals		$ -
Average Price (Sum divided by 24)		$ -
Number of Shares Outstanding at 12-31-00		
Market Value (# shares outstanding x avg. price)		$ -

SCHEDULE OF PREFERRED STOCK - PARENT COMPANY

N/A

Issue	Number of Shares	Book Value	Average Price	Market Value
				$ -
				$ -
				$ -
				$ -
				$ -
				$ -
				$ -
				$ -
				$ -
				$ -
				$ -
				$ -
			TOTAL	$ -

If preferred stocks are publicly traded during the year, submit a schedule showing monthly average of outstanding stock and their related market prices.
If market value is derived by means other than listed quotations, explain how it was derived.
Attach additional sheets as necessary.

SCHEDULE OF COLORADO DEDUCTIONS FROM OPERATING PROPERTY

		COLORADO NET BOOK VALUE
1.	Locally assessed property (note 1)	
2.	Construction work in progress - personal property portion only (note 2)	
3.	Licensed vehicles	
4.	Aircraft subject to Colorado fuel tax	
5.	Licensed special mobile machinery (SMM)	
6.	Inventories, materials and supplies (note 3)	
7.	Property leased to others-taxed to user	
	Other Property (note 4)	
		$ -

Notes

1. Only deductible if included in Operating Property Accounts (page 4) and documented on page 11.
2. Attach details including a schedule with project description, county location, and accumulated cost as of 12-31-00.
3. Includes inventories held for resale, and materials and supplies held for consumption.
4. Attach details, including a schedule with property or project description, historical cost, net book value as of 12-31-00, and location. Otherwise no deduction will be allowed.

Colorado Annual Statement of Property - 2001

Denver & Rio Grande Railway Historical Foundation
(Reporting Company Name)

APPORTIONMENT TO COLORADO COUNTIES

County	Colorado Main Track Mileage Owned	Operated	Total	Percent of Total	County	Colorado Main Track Mileage Owned	Operated	Total	Percent of Total
Adams				0.0%	Kit Carson				0.0%
Alamosa				0.0%	Lake				0.0%
Arapahoe				0.0%	La Plata				0.0%
Archuleta				0.0%	Larimer				0.0%
Baca				0.0%	Las Animas				0.0%
Bent				0.0%	Lincoln				0.0%
Boulder				0.0%	Logan				0.0%
Broomfield *				0.0%	Mesa				0.0%
Chaffee				0.0%	Mineral	17.6	Not operational		~~82.8%~~ 0.0%
Cheyenne				0.0%	Moffat				0.0%
Clear Creek				0.0%	Montezuma				0.0%
Conejos				0.0%	Montrose				0.0%
Costilla				0.0%	Morgan				0.0%
Crowley				0.0%	Otero				0.0%
Custer				0.0%	Ouray				0.0%
Delta				0.0%	Park				0.0%
[illegible]ver				0.0%	Phillips				0.0%
[illegible]lores				0.0%	Pitkin				0.0%
Douglas				0.0%	Prowers				0.0%
Eagle				0.0%	Pueblo				0.0%
Elbert				0.0%	Rio Blanco				0.0%
El Paso				0.0%	Rio Grande	4	Not operational		~~18.0%~~ 0.0%
Fremont				0.0%	Routt				0.0%
Garfield				0.0%	Saguache				0.0%
Gilpin				0.0%	San Juan				0.0%
Grand				0.0%	San Miguel				0.0%
Gunnison				0.0%	Sedgwick				0.0%
Hinsdale				0.0%	Summit				0.0%
Huerfano				0.0%	Teller				0.0%
Jackson				0.0%	Washington				0.0%
Jefferson				0.0%	Weld				0.0%
Kiowa				0.0%	Yuma				0.0%
					TOTAL	21.6 ~~0.00~~	0.00	0.00	0.00%

Allocation of railroad property to Colorado	
Total system track miles owned and operated	21.6
Total Colorado track miles owned and operated	
Colorado track miles/System track miles	#DIV/0!

* - Broomfield is a new county. Insert information if it is available. If you do not have Broomfield data please contact that county (303-438-6291) and gather the necessary information.

SCHEDULE OF
NEW AND DESTROYED -- PERSONAL AND REAL -- PROPERTY

NEW CONSTRUCTION INFORMATION WILL NOT INCREASE YOUR ASSESSED VALUE.

County assessors must certify the value of new construction and destroyed property to taxing entities. Taxing entities must calculate spending and revenue limitations. The limitation calculations are based, in part, on the information provided below. The Division of Property Taxation is required to report this value for state assessed companies to county assessors.

New **real property** is the net book value of any new structure, remodels and additions completed in calendar year 2000. It does not include repairs or general maintenance of existing facilities.
New **personal property** is the net book value of new personal property associated with the listed new real property and placed in service in calender year 2000.
Destroyed **real property** is the net book value of real property destroyed in calendar year 2000.
Destroyed **personal property** is the net book value of all personal property destroyed in calendar year 2000.

DESCRIPTION	COUNTY	(A) TOTAL NET BOOK VALUE OF OPERATING PROPERTY IN THE COUNTY AS OF 1/1/00	(B) NEW or DESTROYED PROPERTY NET BOOK VALUE	(B/A) PERCENT CHANGE
NEW REAL PROPERTY				
Railway	Hinera/ & RioGrand	624,616		
NEW PERSONAL PROPERTY				
1880 CABOOSE #0518	LA Plata	700		
1890 DINING CAR #1	Rio Grande	2,500		
MISC Railway fixtures	Rio Grand	3,600		
DESTROYED REAL PROPERTY				
DESTROYED PERSONAL PROPERTY				

Attach additional sheets as necessary.

Colorado Annual Statement of Property - 2001

(Reporting Company Name)

COUNTY NAME - (Use a Separate Sheet for Each County)

SCHEDULE OF **STATE ASSESSED** OWNED OPERATING PROPERTY - **REAL ESTATE**

This chart is for owned real estate included on the balance sheet and is state assessed. Use page 11 for locally assessed property.
List all Colorado operating property (real, not personal) held in fee.

FACILITY NAME, ADDRESS AND/OR LEGAL DESCRIPTION	DATE PURCHASED	PRICE	DEPRECIATED VALUE
CREEDE BRANCH	8-10-99	624,616	
	TOTAL COUNTY	624,616	

SCHEDULE OF **STATE ASSESSED** LEASED OPERATING PROPERTY - **REAL ESTATE**

List all Colorado operating property (real, not personal) held in fee. Indicate if the lessor is a related party.

ADDRESS / LESSOR NAME	DESCRIPTION	NET BOOK VALUE*	ANNUAL PAYMENT	LEASE INCEPTION DATE	LEASE EXPIRATION DATE
				172	
	TOTAL COUNTY				

Attach additional sheets as necessary.

* Net book value required only if leased property is included on balance sheet.

(Reporting Company Name)

COUNTY NAME – (Use a Separate Sheet for Each County)

SCHEDULE OF **LOCALLY ASSESSED** OWNED OPERATING PROPERTY - **REAL ESTATE**

List all Colorado operating property (real, not personal) held in fee and locally assessed. Indicate the county parcel identification number and/or schedule number. Include what is reported on Page 4 (Balance Sheet) and deducted on Page 7.

FACILITY NAME / ADDRESS	LEGAL DESCRIPTION/SCHEDULE NO.	NET BOOK VALUE

SCHEDULE OF **LOCALLY ASSESSED** LEASED OPERATING PROPERTY - **REAL ESTATE**
LEASED FROM OTHERS, TAXED TO OWNER

LESSOR NAME / ADDRESS	DESCRIPTION	LEASE INCEPTION DATE	LEASE EXPIRATION DATE
			173

Attach additional sheets as necessary.

Colorado Annual Statement of Property - 2001

(Reporting Company Name)

COUNTY NAME -- (Use a Separate Sheet for Each County)

SCHEDULE OF **PROPERTY LEASED TO OTHERS, TAXED TO OWNER**

Capitalized leases are entered on the balance sheet. This page is for operating leases only.

FACILITY NAME / ADDRESS	LEGAL DESCRIPTION/SCHEDULE NO.	ASSESSED VALUE

SCHEDULE OF **PROPERTY LEASED TO OTHERS, TAXED TO USER**

FACILITY NAME / ADDRESS	LEGAL DESCRIPTION/SCHEDULE NO.	ASSESSED VALUE

Attach additional sheets as necessary.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Lewis T. Babcock, Chief Judge

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO
MAY 08 2001
JAMES R. MANSPEAKER
CLERK
BY

Civil Action No. 01-B-0318

CITY OF CREEDE, A Colorado Municipal Corporation,

Plaintiff,

v.

DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION, a Colorado Not-For-Profit Corporation, and DONALD H. SHANK

Defendants.

ORDER

Plaintiff City of Creede ("Creede") brought one claim for declaratory judgment in District Court for Mineral County, Colorado. Defendants Denver & Rio Grande Railway Historical Foundation ("D&RGRHF") and Donald H. Shank (collectively "Defendants") removed the case to this Court. Creede moves to remand. The motion is adequately briefed and oral argument would not materially aid its resolution. For the reasons set forth below, I deny Creede's motion to remand.

I. Facts and Procedural History

The following facts are alleged by the City of Creede. Creede is located in Mineral County, Colorado. In 1972, Creede enacted a zoning regime that zoned certain lands in South Creede as residential. That zoning ordinance continues to today.

The Union Pacific Railroad owned the Creede branch of the Denver & Rio Grande Western Railroad. However, no rail service had been provided to the City of Creede since the

early 1970's, and no rail service of any kind occurred on the line after 1985. On January 25, 1999, Union Pacific published its intent to abandon the railway in the Federal Register. *See* 64 Fed. Reg. 3740-41.

Defendant Denver & Rio Grande Railway Historical Foundation is a not-for-profit corporation. Mr. Shank is its principal officer. Following the publication of Union Pacific's notice of abandonment, Defendants came forward with an Offer of Financial Assistance (OFA) to purchase or acquire by donation the entire line. On April 28, 1999 Union Pacific and D&RGRHF informed the federal Surface Transportation Board (STB) that they had reached an agreement for the purchase and sale of the rail line. By a decision of the Director of the Office of Proceedings, Union Pacific's abandonment exemption was dismissed effective on the date the sale was consummated, and D&RGRHF was authorized to acquire the rail line. To date, Defendants have not used the rail line to provide either passenger or freight service. Instead, they have solicited donations to create a historic tourist train covering the "Wagon Wheel Gap Route" of the Denver & Rio Grande Railway.

Three different aspects of the railway are involved in this case: (1) the tracks themselves; (2) a clearance on each side of the tracks of approximately 25 total feet; and (3) a right-of-way extending beyond the clearance area on each side of the tracks. Only this third area is in dispute in this case. Creede alleges that this right-of-way was not passed to D&RGRHF as part of its purchase from Union Pacific. Instead, it argues that the right of way exists only as a lease from the State of Colorado to Union Pacific, and that because Union Pacific abandoned the right-of-way the land reverted to the State. It believes that the 1972 zoning ordinances apply to the right-of-way, and prohibit any non-residential use of the land.

Creede alleges that Defendants' actions regarding the right-of-way violate the zoning laws passed by Creede. Specifically, Defendants have erected signs and barricades limiting ingress and egress on the right-of-way, instigated criminal proceeding against citizens who they believe have trespassed on or interfered with the right-of-way, issued news statements and releases which declare an intent to carry on commercial activity within the right-of-way, issued "Notices to Vacate" to citizens of Creede occupying the right-of-way, and solicited funds with the promise that commercial activity will take place on the right-of-way. Creede alleges that these acts have created disruption and instability in land use, zoning, and property values within the City. It therefore asks for a declaratory judgment stating that Creede's zoning ordinances are in full force and effect with respect to all lands in South Creede not directly used for freight railroad activity, including Defendants' right-of-way and that Defendants have no right to carry out any activity or make any third-party commercial speech representation that they have any right, claim or basis to carry out non-freight railroad related activities on such land.

Defendants removed the case, arguing that two federal issues exist: (1) whether application of Creede's zoning laws to the right-of-way land is preempted by the Interstate Commerce Commission Termination Act of 1995 (ICCTA), 49 U.S.C. § 10501(b); and (2) whether Creede's zoning laws interfere with D&RGRHF's right to exclusive possession of the land in violation of the commerce clause of the United States Constitution.

II. Motion for Remand

Creede argues that the case must be remanded to state court because no federal issue appears on the face of its well-pleaded complaint. I disagree.

Federal courts are courts of limited jurisdiction and may exercise jurisdiction only when

specifically authorized to do so. *See Castaneda v. I.N.S.*, 23 F.3d 1576, 1580 (10th Cir. 1994). Removal of a case from the state court to the federal court is governed by 28 U.S.C. § 1441, which states:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties.

28 U.S.C. § 1441(a)-(b).

Once a case is removed to federal court, remand to state court is governed by 28 U.S.C. § 1447. That statute provides that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded . . . The State court may thereupon proceed with such case." *See id.* at § 1447(c). "The plain language of § 1447(c) gives 'no discretion to dismiss rather than remand an action removed from state court over which the court lacks subject-matter jurisdiction.'" *Fent v. Oklahoma Water Resources Bd.*, 235 F.3d 553, 558 (10th Cir. 2000) (citations omitted).

In order to invoke federal question jurisdiction, a federal issue must appear on the face of a well-pleaded complaint. 28 U.S.C. § 1331; *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 808 (1986). In a declaratory judgment action, however, the position of the parties is often reversed: the plaintiff's complaint actually asserts a defense to an anticipated action by the declaratory judgment defendant. *See Cardtoons, L.C. v. Major League Baseball Players*

Ass'n, 95 F.3d 959, 964 (10th Cir. 1996). It is the character of the impending action, not the plaintiff's defense, that determines whether there is federal question jurisdiction. *Id.; see also Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 19 & n.19 (1983). Thus, federal question jurisdiction exists in a declaratory judgment action if the potential coercive suit by the declaratory judgment defendant would arise under federal law. *Franchise Tax Bd.*, 463 U.S. at 19 & n.19; *Cardtoons*, 95 F.3d at 964.

Accordingly, federal question jurisdiction in this case turns on whether the potential suit by Defendants against Creede would arise under federal law. Defendants claim that the ICCTA preempts Creede's zoning regulations. Therefore, Defendants potentially would have sought injunctive relief to prevent enforcement of the zoning regulations as they apply to the right-of-way.

I evaluate the adequacy of the Defendant's federal claim by the same standard that I would use to evaluate federal question jurisdiction if that claim was actually before me. *See Cardtoons*, 95 F.3d at 965; *Janakes v. United States Postal Serv.*, 768 F.2d 1091, 1093-95 (9th Cir. 1985). Dismissal of a complaint for lack of subject matter jurisdiction would only be justified if "that claim were 'so attenuated and unsubstantial as to be absolutely devoid of merit' or 'frivolous.'" *Baker v. Carr*, 369 U.S. 185, 199 (1962) (citations omitted).

"[I]t is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights . . . . A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction . . . to resolve." *Shaw v. Delta Air Lines, Inc.*, 463 U.S.

85 (1983). In *Shaw*, the Court found no jurisdictional defect in a suit seeking to enjoin enforcement of certain sections of the New York Human Rights Laws on the ground that ERISA pre-empted the state rules. *Id.* Here, Defendants' well pleaded complaint would seek to enjoin Creede from enforcing its zoning regulations on the ground that ICCTA preempts the local regulations. Such a suit would be nonfrivolous and would provide this court with federal question jurisdiction. Therefore, I have jurisdiction over Creede's declaratory judgment action.

Accordingly, IT IS ORDERED that:

1. Plaintiff's motion to remand is DENIED.

Dated: May 7, 2001, in Denver, Colorado.

BY THE COURT:

Lewis T. Babcock, Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CERTIFICATE OF SERVICE

Civil Case No. 01-B-318

The undersigned certifies that a copy of the foregoing Order was served on May 8, 2001, by:

() delivery to:

(X) depositing the same in the United States Mail, postage prepaid, addressed to:

W. Randolph Barnhart, Esq.
Hillyard & Barnhart, L.L.P.
7887 East Belleview ve., Suite 1200
Englewood, CO 80111

George M. Allen, Esq.
P.O. Box 66; 145 Payson Street
Naturita, CO 81422

Raymond P. Micklewright, Esq.
Wolf & Slatkin, P.C.
44 Cook Street, Suite 1000
Denver, CO 80206-5827

Deputy Clerk

Add file

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Honorable Lewis T. Babcock
Chief United States District Judge

Honorable Craig B. Shaffer
United States Magistrate Judge

CIVIL ACTION NO. 01-B-0318

CITY OF CREEDE,
a Colorado Municipal Corporation,

Plaintiff,

-vs-

DENVER & RIO GRANDE RAILWAY
HISTORICAL FOUNDATION,
a Colorado Not-For-Profit Corporation
and DONALD H. SHANK,

Defendants.

PLAINTIFF'S MOTION FOR LEAVE TO TAKE DEPOSITION OF DEFENDANT DONALD H. SHANK PRIOR TO TIME ESTABLISHED BY SCHEDULING ORDER;

REQUEST FOR EXPEDITED CONSIDERATION OF MOTION

Local Rule 7.1 Compliance

The undersigned conferred by telephone on May 15, 2001 with Raymond Micklewright, Esq., counsel for defendants, as to taking of the deposition of Donald H. Shank on the date proposed (June 6, 2001). Mr. Micklewright has authorized me to say that he does not agree to the taking of

Mr. Shank's deposition on that date. As a professional courtesy, Mr. Micklewright stated that June 6, 2001 is a date on which he would be able to attend and participate in a deposition of Mr. Shank.

Motion For Leave To Take Deposition Of Donald H. Shank

Plaintiff moves for leave to take the deposition of Donald H. Shank, pursuant to Rule 30, F.R.Civ.P., on June 6, 2001 in Denver. No Rule 26(f) conference has taken place in this action and leave of this Court is therefore needed to take Mr. Shank's deposition on the date requested. Grounds for this motion are summarized as follows:

1. The defendants have stated several times that they intend to request that this Court refer this litigation to the Surface Transportation Board under their claim the STB has primary jurisdiction. The Plaintiff does not agree that this matter should be referred to the STB, but recognizes that some courts have referred similar litigation to the STB.[1]

2. The purpose of granting of rights under an Offer of Financial Assistance is to provide for carriage of interstate freight shipments. The entire body of information available to the plaintiff (and developed in some detail in prior filings in this action) indicates

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[1] *Not all cases involving applicability of local police and zoning powers to railroad rights of way have been referred to the STB.* Florida East Coast Ry. v. City of West Palm Beach, *110 F.Supp. 2d 1367 (S.D. Fl 2000), recently argued on appeal in the Eleventh Circuit, and cited by the STB in its leading case on scope of local government regulation of rights of way,* Borough Of Riverdale - Petition For Declaratory Order - The New York Susquehanna And Western Railway Corporation, *STB Finance Docket No. 33466 (served February 23, 2001), has been processed entirely in the District Court and Eleventh Circuit. Some local government regulation cases have, however, been referred to the STB.*

that there is no competence or plan by the defendants for carriage of interstate freight shipments over the rail line at issue and the evidence further establishes that there is no prospective shipper to support interstate freight rail service.

3. The actions of the defendants have been and continue to be profoundly disruptive to the City of Creede and its residents. While defendants do not appear to be moving in the direction of carriage of interstate freight, they have nevertheless been active in threatening commercial development of the right of way within the City of Creede and have solicited contributions and, arguably, investments, for the purpose of creation of a rail-based, steam-powered, tourist attraction having Creede as its centerpiece.

4. As already set forth at considerable length in the motion to take Mr. Shank's deposition which was pending in the state court prior to removal, the disruptive activities of the defendants probably give rise to need for equitable intervention in the form of injunction but any motion for such injunction would be better presented if founded on deposition testimony than on mere affidavit.

5. Much of the information necessary to dispose of either issues which might arise in the Surface Transportation Board or in injunction motion practice in this Court is in the hands of Mr. Shank and is available to the Plaintiff only by use of compulsory process. Certainly the testimony and documentary evidence which can be developed in a deposition of Mr. Shank would be the best evidence on a number of issues

which are germane to the matters which are of immediate concern.[2]

This motion is based on the Affidavit of Creede Mayor B.J. Myers, filed under separate cover, on the submissions made to the state court prior to removal in support of our attempt to take Mr. Shank's deposition while the case was in state court and on the Court's complete files and records in this action. A proposed deposition notice is attached to this filing.

Respectfully submitted,

GEORGE M. ALLEN
206-A Society Drive
Telluride CO 81435
Telephone: 970-369-1000
Facsimile: 970-369-1009
Email: alnoma@yahoo.com

Counsel for Plaintiff

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[2] *The City of Creede's posture* ***at this time*** *is that it would resist referral to the STB. Further factual development, however, including the deposition sought herein, is likely to establish that there is no basis to conclude there will* ***ever*** *be interstate freight rail service operated by the defendant foundation. That factual development could support either a direct petition by Creede to the STB to revoke the Foundation's OFA rights or a counter-petition on behalf of Creede, if this Court refers this action to the STB, seeking revocation of the defendants' OFA rights on the basis they were improvidently authorized and that there is no factual basis to conclude that there will ever be viable interstate freight rail service over the right of way the Foundation now controls from South Fork to Creede.*

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Honorable Lewis T. Babcock
Chief United States District Judge

Honorable Craig B. Shaffer
United States Magistrate Judge

CIVIL ACTION NO. 01-B-0318

CITY OF CREEDE,
a Colorado Municipal Corporation,

Plaintiff,

-vs-

DENVER & RIO GRANDE RAILWAY
HISTORICAL FOUNDATION,
a Colorado Not-For-Profit Corporation
and DONALD H. SHANK,

Defendants.

NOTICE OF DEPOSITION OF DEFENDANT DONALD H. SHANK
F. R. Civ. P. Rule 30

Plaintiff, by its undersigned counsel, hereby gives notice that it will take the deposition of Donald H. Shank, on oral interrogatories, pursuant to Rule 30, F.R.Civ.P., at the venue set forth below or at such other venue as may be mutually agreed or ordered by the Court. The time of commencement of the deposition is 10:30 a.m on Wednesday, June 6, 2001, or such other time as may be mutually agreed by counsel or ordered by the Court.

Because this Deposition Notice is for a time prior to a Rule 26(f) conference and because this Notice is less than the time period required by rule, a Motion for Leave of Court to take this deposition is being filed and is forwarded to you herewith.

The subject matter of inquiry at the deposition will include at least the topics related to the same subject matter as the requested documents and further denominated in the rider to this Notice, which hereby seeks the production of documents of Mr. Shank or under his care, custody or control relating to this subject matter:

1. Status of Payment to Union Pacific by the Defendant Foundation;
2. All Financial Records of the Defendant Foundation;
3. All Tax Returns of the Defendant Foundation;
4. All IRS and/or Colorado Secretary of State and Department of Revenue submissions of the Defendant Foundation;
5. All Records Relating to Fundraising by the Defendant Foundation;
6. All Record of Payments to Donald H. Shank related to the Creede Branch;
7. All Records related to prospective shippers of interstate freight on the Creede Branch;
8. All Records related to use of the railroad rails, roadbed and other physical assets on the Creede Branch;
9. All Records related to purchase or lease of rolling stock for use on the Creede Branch;
10. All Records related to establishment of freight tariffs on the Creede Branch;
11. All feasibility studies related to resumption of freight rail service on the Creede Branch including but not limited to records of communications with potential operators of freight rail service on the Creede Branch;
12. All Records of expenditure by Donald Shank or the Defendant Foundation with respect to resumption of either passenger or freight rail service;
13. All Records related to contracts, communications or other contacts with prospective operators and/or shippers with respect to the Creede Branch;
14. All Records related to contemplated or actual sale of scrap or salvage on the Creede Branch;
15. All Records related to commencement of interstate freight rail shipment by the Defendant;
16. All Records relating to establishment and tax-exempt status of the defendant Foundation on the Creede Branch;
17. All submissions by or on behalf of the Defendant Foundation to the Surface Transportation Board;
18. All consummated or proposed lease or real estate transactions related to the Creede Branch

19. All communications to or by third parties made by or on behalf of the Defendant Foundation;
20. All communications to or by third parties involving Mr. Shank and the Creede Branch;
21. All records of litigation in the past ten years involving Mr. Shank, personally and/or the Foundation;
22. All records of bank accounts of the Defendant Foundation for the past three years;
23. All records relating to the Defendant Foundation, including corporate minutes, resolutions, correspondence, appointments, resignations;

Deposition Venue

Law Offices of
Raymond P. Micklewright, Esq. 13009
WOLF & SLATKIN
44 Cook Street,
Suite 1000
Denver CO 80206-5827
Telephone: 303-355-2999
Facsimile: 303-329-6826

Dated this May 16, 2001
at Omaha, Nebraska

Respectfully submitted,

GEORGE M. ALLEN
Counsel for Plaintiff

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RIDER

You are hereby directed to produce for inspection, copying and use at your deposition all records pertaining to the following the subject items set forth below. Records means papers, computer storage information including hard drives, disks or CD's or other means of preservation of information, whether hard copy or magnetic and whether in your immediate possession or in your control even if not in your immediate possession.

Subject Items:

Status of Payment to Union Pacific by the Defendant Foundation
All Financial Records of the Defendant Foundation
All Tax Returns of the Defendant Foundation
All IRS and/or Colorado Secretary of State and Department of Revenue submissions of the Defendant Foundation
Fundraising by the Defendant Foundation
Payments to Donald H. Shank related to the Creede Branch
Prospective shippers of interstate freight on the Creede Branch
Use of the railroad rails, roadbed and other physical assets on the Creede Branch
Plans, studies, bids or communications related to purchase or lease of rolling stock for use on the Creede Branch
Plans, studies, bids or communications related to establishment of freight tariffs on the Creede Branch
Feasibility studies related to resumption of freight rail service on the Creede Branch including but not limited to records of communications with potential operators of freight rail service on the Creede Branch
Expenditure by Donald Shank or the Defendant Foundation with respect to resumption of either passenger or freight rail service
Contracts, communications or other contacts with prospective operators and/or shippers with respect to the Creede Branch,
Plans, studies, bids or communications related to scrap or salvage on the Creede Branch
Plans, studies, bids or communications related to commencement of interstate freight rail shipment by the Defendant
Tax-exempt status of the defendant Foundation on the Creede Branch;
Submissions by or on behalf of the Defendant Foundation to the Surface Transportation Board
Consummated or proposed lease or real estate transactions related to the Creede Branch
Communications to or by third parties made by or on behalf of the Defendant Foundation
Communications to or by third parties involving Mr. Shank and the Creede Branch
Records of litigation in the past ten years involving Mr. Shank and/or the Foundation
Banking transactions of the Defendant Foundation for the past three years

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Honorable Lewis T. Babcock
Chief United States District Judge

Honorable Craig B. Shaffer
United States Magistrate Judge

CIVIL ACTION NO. 01-B-0318

CITY OF CREEDE,
a Colorado Municipal Corporation,

Plaintiff,

-vs-

DENVER & RIO GRANDE RAILWAY
HISTORICAL FOUNDATION,
a Colorado Not-For-Profit Corporation
and DONALD H. SHANK,

Defendants.

MEMORANDUM BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO TAKE DEPOSITION OF DEFENDANT DONALD H. SHANK PRIOR TO TIME ESTABLISHED BY SCHEDULING ORDER AND IN SUPPORT OF REQUEST FOR EXPEDITED CONSIDERATION OF MOTION

Facts

Defendant Donald Shank and the Foundation he controls do not appear headed in the direction of resumption of interstate freight rail service to Creede. But that is not to say that Mr. Shank has not been doing anything in and around Creede. The attachments to Mayor Myers' May 16, 2001 Affidavit demonstrate that Mr. Shank, acting both directly and through his Chicago-based

legal counsel, Thomas F. McFarland, Jr., continues to try to obtain revenue from the railroad right of way by a series of attempts to terrify Creede businesses and residents into making lease payments to the Foundation.

As Mayor Myers' affidavit states, the rental amounts sought are large enough to raise an uproar and cause great damage in Creede, but not nearly enough to ever get close to the millions of dollars which would be needed to re-establish interstate carriage of freight over a roadbed which has been out of use for nearly two decades.

Procedural Posture

Our motion to remand this action to state court was denied on May 8, 2001. Creede accepts that ruling and will proceed with this matter in this federal Court. At the time of submission of this motion, on May 16, 2001, no order has been issued establishing a date for a Scheduling Conference and no Rule 26(f) consultation has taken place between plaintiff's counsel and counsel for the defendants. Thus there is no right to take a deposition of Mr. Shank without leave of court.

Summary

The extensive materials previously filed and Creede Mayor Myers' May 16, 2001 affidavit, filed herewith, show that Mr. Shank's undertakings to exploit his Offer of Financial Assistance rights on the abandoned Denver & Rio Grande Western Railroad right of way from South Fork to Creede have been highly disruptive to the business and public affairs of Creede and its residents.

The disruptions are of two kinds. One is the portent that fund-raising activities by Mr. Shank and his foundation will ultimately lead to recriminations and legal action by disgruntled or deceived contributors to (and/or investors in) Mr. Shank's enterprise. Since repeated representations have

been made that Mr. Shank will operate a steam-powered nostalgic passenger rail service as a tourist attraction between South Fork and Creede, and in so doing will operate or license entertainments and concessions on the right of way, and since that right of way is on land subject at least to some extent to Creede's zoning and police powers, Creede's concern that the City of Creede and its elected and appointed officials may find themselves in the cross-hairs of such litigation is not merely fanciful.

Creede has no effective means of communication to everyone in the world who might be deceived or disgruntled with respect to what happens to money entrusted to Mr. Shank and his foundation. Creede is also, as a municipality with an abandoned railroad right of way running its entire length, an interested party with substantial rights in the abandoned right of way. 43 U.S.C. §912 provides that an abandoned railroad right of way originally obtained under the General Railway Act of 1875 may revert to the municipality through which the right of way runs.[3]

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[3] *43 U.S.C. § 912 provides:*

Section 912. Disposition of abandoned or forfeited railroad grants

Whenever public lands of the United States have been or may be granted to any railroad company for use as a right of way for its railroad or as sites for railroad structures of any kind, and use and occupancy of said lands for such purposes has ceased or shall hereafter cease, whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon all right, title, interest, and estate of the United States in said lands shall, except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree or forfeiture or abandonment be transferred to and vested in any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may

This suit pertains specifically to enforcement of Creede's residential zoning as to non-railroad land on Section 36, which is school land in South Creede. But the land immediately to the north, in section 25, is land which is subject to the reversion clause set forth in 43 U.S.C. §912. And it is on that land that Mr. Shank's activities are constituting the second and more immediate type of disruption.

The attachments to the May 16, 2001 Myers affidavit show that Mr. Shank and his Chicago attorney are soliciting businesses and residents on Section 25 for leases and lease payments. Those solicitations, couched as threats of eviction, are highly disruptive in Creede since much of Creede's downtown business district is made up of commercial structures which lie in part on the abandoned railroad right of way.

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have been or may be granted, conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad or railroad structures of any kind as aforesaid, except lands within a municipality the title to which, upon forfeiture or abandonment, as herein provided, shall vest in such municipality, and this by virtue of the patent thereto and without the necessity of any other or further conveyance or assurance of any kind or nature whatsoever: Provided, That this section shall not affect conveyances made by any railroad company of portions of its right of way if such conveyance be among those which have been or may after March 8, 1922, and before such forfeiture or abandonment be validated and confirmed by any Act of Congress; nor shall this section affect any public highway on said right of way on March 8, 1922: Provided further, That the transfer of such lands shall be subject to and contain reservations in favor of the United States of all oil, gas, and other minerals in the land so transferred and conveyed, with the right to prospect for, mine, and remove same.

The law pertaining to rights of would-be operators under Offers of Financial Assistance makes it clear that such operators do not have the right to use the shield of an OFA undertaking to "obstruct other legitimate purposes of law" and that the OFA process is designed for the purpose of continuing to provide freight rail service. *Roaring Fork Railroad Holding Authority - Abandonment Exemption - In Garfield, Eagle and Pitkin Counties, CO,* STB Docket No. AB-547X (May 19, 1999)[4].

We have sought to take Mr. Shank's deposition in order to lay a clear and admissible factual foundation for such motion practice (or other proceedings) as may be appropriate in the circumstances. As the undersigned stated in a submission to Judge Ogburn, who was within a day of ruling on a motion to take Mr. Shank's deposition in state court prior to the removal, it is the better practice to base any such submissions on actual testimony from the one person in a position to know the true facts regrading the activities of the Foundation – Mr. Shank – than to proceed based on the abundant supply of hearsay and rumor abroad in the Creede community.

It will be a challenging exercise to determine the contours of the Foundation's rights, if any, to carry on a real estate leasing business or operation of a steam-powered tourist train, rather than carriage of interstate freight rail service, even based on clear and uncontested facts. To try to do that legal work on the basis of speculation, rumor and hearsay is not the way to approach the task. The better way is to get Mr. Shank's testimony and obtain such documents as he may have reflecting the affairs of the Foundation and its capacity and likelihood of carrying interstate freight shipments and

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[4] *Copies of STB and ICC decisions cited in this filing are attached to this Memorandum Brief.*

then determine, either in this forum or the STB, whether the Foundation's non-interstate-freight-carrying activities are consonant with applicable law and regulations.

Discussion

1. Plaintiff Has A Compelling Need To Obtain Deposition Testimony And Will Be Prejudiced By Delay.

We have furnished this Court with abundant materials to show that the activities of the defendant Foundation are disruptive. We have also furnished materials which raise a strong inference that the defendant Foundation is not doing anything toward carrying interstate freight shipments.

We do not yet have a date for a Scheduling Conference and the portent of a motion to refer this case to the STB, repeatedly promised by the defendants, could delay establishment of a deposition schedule for further weeks or months. Meanwhile, the disruptions to Creede caused by the Shank/Foundation activities are ongoing.

2. Rule 30(a)(2)(C) Provides Authority For This Court To Grant Leave To Take The Shank Deposition In The Near Future.

F.R.Civ.P. Rule 3)(a)(2)(C) is directly pertinent to the instant request to take the Shank deposition. It provides for obtaining leave of court when a deposition is sought prior to the holding of a Rule 26(f) conference.

Decisional law construing Rule 30 demonstrates that District Courts have broad discretion to control or limit the taking of depositions. Most of the cases arise in the context of applications to take additional depositions of witnesses already deposed. Those circumstances are directly

analogous to the instant motion. In a controlling case, the Tenth Circuit Court of Appeals held, in *Smith v. United States*, 834 F. 2d 166 (1987), that District Courts have discretion to reopen depositions. A similar result was reached in *Hurley v. JARC Builders, Inc.*, 164 F.R.D. 39 (E.D.Pa.. 1995).

While the *Smith* and *Hurley* cases, supra, involved construction of Rule 30(a)(2)(B), the principles for dealing with this Rule 30(a)(2)(C) motion are the same. In both instances, the Court is directed to look to the considerations set forth in Rule 26(b)(2). Those principles, which deal with whether the discovery sought will be unduly burdensome, duplicative or otherwise not advisable, are applicable here. Also prescribed by Rule 26(b)(2) as a guide to determination of a Rule 30(b)(2)(C) motion is consideration of whether the party seeking the discovery has had any other opportunity to obtain the material for which the discovery is sought.

The material we seek here is information regarding the affairs of the defendant Foundation and its plans, financial ability and related material relating to whether it has any basis to implement interstate freight rail shipment. If, as Creede believes, the Foundation has no such competence or resources, and if, as Creede believes, the oppressive real estate and fundraising activities which the Foundation is carrying on are ends in themselves and unrelated to carriage of interstate freight by rail, then, as we demonstrate below, Creede and its residents would appear to have a clear right to seek relief from those activities in this forum and/or to seek from the Surface Transportation Board revocation of the Offer of Financial Assistance under which the Foundation is proceeding.

3. Interstate Carriage Of Freight By Rail Is The Sine Qua Non Of The Grant Of Rights Under An Offer Of Financial Assistance.

A case arising in this jurisdiction, *Roaring Fork Railroad Holding Authority - Abandonment Exemption - In Garfield, Eagle and Pitkin Counties, CO,* STB Docket No. AB-547X (May 19, 1999), has made it clear that if the defendant Foundation is not going to be engage in rail carriage of interstate freight shipments, it has no business operating the right of way under and Offer of Financial Assistance.

In the *Roaring Fork* case, the STB held:

> The OFA process is designed for the purpose of continuing to provide freight rail service, and is not to be used to obstruct other legitimate processes of law (whether Federal, state, or local) when continuation of such service is not likely. See The Land Conservancy of Seattle and King County--Acquisition and Operation Exemption-- The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 33389 et al., slip op. at 13 (STB served May 13, 1998).[11] Accordingly, when disputed, an offeror must be able to demonstrate that its OFA is for continued rail freight service. Union Pacific Railroad Company--Abandonment Exemption--In Lancaster County, NE, Docket No. AB-33 (Sub-No. 71X) (ICC served Sept. 28, 1992); Conrail Abandonment West 30th Street, NY, Docket No. AB-167 (Sub-No. 493N) (ICC served Jan. 13, 1987). Where, as here, the line is not currently active, there must be some assurance that shippers are likely to make use of the line if continued service is made available, and that there is sufficient traffic to enable the operator to fulfill its commitment to provide that service. See The Burlington Northern and Santa Fe Railway Company--Abandonment Exemption--In King County, WA, STB Docket No. AB-6 (Sub-No. 380X), slip op. at 5 (STB served Aug. 5, 1998).[12] The record in this case does not provide such assurances.

The *Lancaster County, Nebraska* case, cited by the STB in its 1999 *Roaring Fork* Decision, illustrates the need to demonstrate that there will be viable shipping traffic to support a rejuvenated freight line. In *Lancaster County* the Interstate Commerce Commission held:

> * * * [t]here is no requirement that rail service be operational before an offer con be considered under the OFA procedures of section 10905. Abandonment of R.Lines and Discontinuance of Service, 365 I.C.C. 249, 260 (1981). However, in West 30th

> Street at 5, we stated that we had to determine whether "any shipper would make use of this line. The availability of sufficient traffic is a critical factor in determining whether [the offeror] will be able to fulfill its obligation to provide continued rail service.

Union Pacific Railroad Company--Abandonment Exemption--In Lancaster County, NE, Docket No. AB-33 (Sub-No. 71X) (ICC served Sept. 28, 1992) at page 5.

The *King County* STB decision, cited in *Roaring Fork*, represents a recent and adamant holding by the STB that it will not allow its OFA processes to be used to shield activities not related to rail transportation. In *King County* an OFA was used to transfer ownership of an abandoned right of way to an entity which undertook immediate conversion to a trail. The STB vacated the OFA and proclaimed that the OFA process might not be used for non-rail transportation purposes:

> The offer of financial assistance process envisions that a party that acquires a rail line under 49 U.S.C. 10904 continue to provide rail service. Where that is not the case, we will not allow our jurisdiction to shield a railroad, or any other party seeking relief before us, from the legitimate processes of Federal; state or local law. See Modern Handcraft, Inc. – Aban., 363 I.C.C. 969 (1981) (Modern Handcraft); Kansas City Pub. Ser. Frgt. Operation – Exempt Aban. 7 I.C.C.2d 224-226 (1990); and Chelsea Property Owners – Aban.– The Conrail R. Corp., 8 I.C.C. 2d 773, 778 (1992), aff'd. sub nom. Conrail.

The Land Conservancy of Seattle and King County--Acquisition and Operation Exemption– The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 33389 et al., slip op. at 13 (STB served May 13, 1998), at page 13.

4. Mr. Shank's Deposition Is Needed To Protect Legitimate Processes Of Law.

Two legitimate processes of law are implicated in this litigation. One is Creede's local law police and zoning competence. Creede has a right recognized by both the STB, in the

Riverdale case[5] and by the District Court for the Southern District of Florida in the *West Palm Beach* case[6], to enforce its local zoning as to non-railroad activities on the abandoned D&RGW right of way. The other, and even more compelling, process of law implicated in these proceedings (although not within the pleadings as presently formulated) is the right of reversion of an abandoned right of way. Creede, as a municipality through which passes a right of way obtained under the 1875 General Railway Act, has a reversionary right to the land in Section 25. That reversion would embrace the properties owned, for example, by Louise Gray and Mr. Basky, both of which are under threat of eviction unless agreement is made to pay rent to Mr. Shank and his Foundation.

It is palpable that Mr. Shank and the Foundation are using the protected status of the Offer of Financial Assistance to try to go into the commercial real estate leasing business in the City of Creede. There does not appear to be any competence or plan or shipper-driven need for provision of interstate freight rail service and to date there is no tangible indication such service will ever be provided.

To some extent, however, Creede is in the same posture as the blind man trying to figure out what an elephant is by touch and not by sight. Creede has no ready means of access to records of the Foundation or to any evidence it may have regarding potential shippers, cost of reestablishment

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[5] Borough Of Riverdale - Petition For Declaratory Order - The New York Susquehanna And Western Railway Corporation, *STB Finance Docket No. 33466 (STB served February 23, 2001)*, supra.

[6] Florida East Coast Ry. v. City of West Palm Beach, *110 F.Supp. 2d 1367 (S.D. Fl 2000)*.

of the rail line or other information of vital significance to determination of the issues in this suit.[7]

We recognize that some aspects of the issues implicated in this case, such as potential revocation of the Offer of Financial Assistance, are in the unique competence of the Surface Transportation Board and not this District Court. We also recognize that the STB has procedural rules for discovery (*c.f.* 49 C.F.R. §1114.21, *et seq.*).

But the burdens on Creede and its residents from threats of eviction and other disruptions are real and immediate. To deal with them we must operate based on sound evidence, not on hearsay, rumor or conjecture. The best and most expeditious way to do that is to depose Mr. Shank. This we have proposed to do for the past several months. We have requested the date of June 6, 2001 in Denver, but we are prepared to take the deposition on a different date and in a different venue in order to accommodate Mr. Shank and his counsel. For Creede, the important thing is to move this proceeding from the realm of innuendo to one of hard evidence and we submit the best way to do that is to take Mr. Shank's deposition at the earliest possible date.

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[7] *To date we have no documentation of the costs involved in rehabilitation of the South Fork to Creede right of way if it were to be made functional for freight service. This attorney has been involved for the past nine years in various proceedings, including litigation in this District, the 10th Circuit and the STB, relating to the Aspen Branch of the D&RGW between Glenwood Springs and Aspen. There a consultant's study put the cost of reestablishment of rail service at about $46 million (in 1995 dollars) for some 37 miles of right of way, 12 miles of which were still in active freight service from Glenwood Springs to Carbondale. It is difficult to believe reestablishment of service to Creede, crossing three bridges (vs. one bridge in the Roaring Fork Valley), particularly for passengers, could be any less than $ 1 million per mile for the 21 miles from Creede to South Fork. Louise Gray would have to pay the Foundation lease rent on her garage of $300 per year for 70,000 years to provide Mr. Shank and the Foundation with $21 million.*

Conclusion

For the reasons set forth above, we respectfully request this Court order that Plaintiff be allowed to take the deposition of Donald H. Shank on the proposed date of June 6, 2001 in Denver, or on such other early date and at such other venue as may be mutually convenient for Mr. Shank and the counsel involved.

Request For Expedited Consideration

We respectfully request this Court resolve this Motion on an expedited basis. This writer is scheduled to be in state court in Albuquerque, New Mexico on June 4, 2001 and has the date of June 6, 2001 available in Denver. Thereafter it will be necessary for me to be in Omaha, Nebraska for about two weeks before returning to Colorado for a federal status conference on another matter on June 21, 2001[8]. I am then committed to a preliminary pre-trial conference in Salt Lake City on June 26, 2001. While he opposes this motion, June 6, 2001 is a date which Mr. Micklewright has stated is workable for his calendar.

Respectfully submitted,

GEORGE M. ALLEN
Counsel for Plaintiff

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[8] *This writer's mother is 87 years of age and lives alone in Omaha. The undersigned tries to spend about ten days each month in Omaha to assist with her care. Omaha is a fortuitous locale for work on railroad-related matters as there are excellent resource materials available at the Creighton University Law School library and at the Legal Department of the Union Pacific Railroad.*

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Honorable Lewis T. Babcock
Chief United States District Judge

Honorable Craig B. Shaffer
United States Magistrate Judge

CIVIL ACTION NO. 01-B-0318

CITY OF CREEDE,
a Colorado Municipal Corporation,

Plaintiff,

-vs-

DENVER & RIO GRANDE RAILWAY
HISTORICAL FOUNDATION,
a Colorado Not-For-Profit Corporation
and DONALD H. SHANK,

Defendants.

AFFIDAVIT OF B.J. MYERS
(May 16, 2001)

COUNTY OF MINERAL)
) ss.
STATE OF COLORADO)

B.J. Myers, being duly sworn, states:

1. I am the Mayor of Creede, Colorado.

2. The statements herein are made of my own knowledge.

3. I know of no potential shipper of freight in Creede, Colorado or elsewhere who would utilize a freight rail service for interstate freight shipments to or from Creede.

4. Creede has gone for nearly two decades without any freight rail service with no perceptible problem.

5. Since the early 1960's, the only interstate freight rail business prior to closure of the D&RGW branch to Creede involved shipment of ore from a now-closed mine. Absent resumption of mining operations, I cannot conceive of any need or demand for any freight rail service to Creede.

6. There are no plans for resumption of mining activity in the Creede area.

7. Attached hereto are copies of an exchange of correspondence among Donald Shank, Lawrence M. Basky, Mr. Basky's Alamosa, Colorado lawyer, Margaret J. Russell and Mr. Shank's Chicago lawyer, Thomas J. McFarland.

8. So far as I know, Mr. Basky has not entered into a lease agreement with Mr. Shank's Foundation.

9. My understanding, after inquiry made on behalf of Creede, is that Mr. McFarland is not licensed to practice law in the State of Colorado.

10. Similar threats have been made to other businesses and residents who have properties located on the railroad right of way in Section 25. At least some of them have agreed to make lease payments to the Foundation rather than face the

threat of eviction. One such person is Louise Gray. I have previously said under oath, in a state court affidavit in this case:

> One Creede citizen, Louise Gray, was told she must lease the land on which her garage is situated, and was told she must pay Mr. Shank and his Foundation $300.00 per year for land she has owned and occupied for many years. I know Louise Gray. She is elderly and retired from her job at the hardware store and lives on her social security and modest personal supplemental income from activities such as picking up aluminum cans and reselling them. For Mr. Shank to try to force her to pay him $300 per year as lease rent for land he and his Foundation do not own and probably never will own, with the threat he will close access to Louise Gray's garage and preclude use of her car, purchased with funds from her scavenging, is cruel and extortionate beyond any comprehension. . . . . How in the world will Louise Gray ever be able to buy $1 million insurance coverage for Shank's Foundation? And if she does not come up with the insurance, will she lose access to her house, her garage and her car even after she pays Mr. Shank his extortionate rent? Attached to this Affidavit are copies of the draft leases and transmittal letters sent to Louise Gray and also to Mr. and Mrs. Dale Pizel. It is my understanding that similar extortionate demands have been made on numerous other Creede landowners.

11. My understanding is that Louise Gray has now signed a lease to pay Mr. Shank's Foundation $300.00 per year and that Mr. Shank has waived or deleted the boilerplate lease clause which would have required Ms. Gray to furnish his foundation with liability insurance of up to $1 million. I am certain that such payment is a hardship to Ms. Gray. I am equally certain that this rental an others like it will not begin to yield enough money to make up the milli dollars which would be required to rehabilitate the 21 mile rail line,

bridges and resume freight rail service.

12. There is no tangible sign that Mr. Shank or his Foundation have any intent or capability to initiate interstate freight rail service. Their entire thrust, before they closed down their web-site, was to raise money for a steam-powered, coal-fired tourist train from South Fork to Creede. I never saw any material pertaining to an operation to ship freight and I believe, as Creede's mayor and a long-time town resident and business operator, that I would have seen any such material if it existed. For example, no one has solicited my business as to whether we plan to ship either in or out of Creede anything which could go more economically in a rail car than by UPS or in the back of a station wagon.

13. Creede is well served by existing surface carriers, including UPS and the United States Postal Service. Trucks are sufficient to haul in building materials and fuel. We have a permanent population of only a few hundred and it is absolutely inconceivable to me, if we have gotten by without freight rail service for nearly 20 years, that there is now any need or economic viability for interstate freight rail service.

I have read the above affidavit and the statements therein are true.

B.J. Myers

Subscribed and sworn to before me this 16th day of May, 2001 at Creede, Colorado.

Notary Public

DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION

A COLORADO NOT-FOR-PROFIT/TAX-EXEMPT CORPORATION

February 15, 2001

Lawrence M. Basky
d.b.a. Basky Gallery
6856 Cottonwood Lane
Alamosa, CO 81101

Re: New right-of-way Lease

Dear Mr. Basky:

On May 24, 2000, the Denver & Rio Grande Railway Historical Foundation (DRGHF) consummated the purchase of the right-of-way from South Fork (Derrick) through the City of Creede. A portion of your commercial building at 111 Main Street in Creede occupies right-of-way owned by DRGHF. As legal successor to the Union Pacific Railroad, all portions of our right-of-way will be accounted for and Leases generated accordingly.

Therefore, accompanying this letter please find your new Lease, in duplicate copies. The rental amount has increased modestly in comparison to the dramatic increase in property values.

If it is your desire to continue to occupy right-of-way of the DRGHF, please execute both copies of the Lease documents, initial each page, return both copies for our execution and please include your check for the annualized amount within thirty (30) days upon receipt of this notice. We will forward a fully executed original to you for your records.

If your preference is to terminate your occupancy, please do so within the same thirty (30) day period and make arrangements to vacate our right-of-way in accordance with the terms and conditions as agreed to within your previous Lease.

Thank you in advance for your prompt attention.

Sincerely,

Donald Shank
President, DRGHF

enclosure/ 2 copies lease document

FOUNDATION OFFICE: 1474 MAIN AVENUE, SUITE 225, DURANGO, CO 81301
TEL: 970.259.9498 FAX: 259.0202 E-mail: drghf@frontier.net

Law Office of
JACOBS & RUSSELL, LLC
P.O. Box 120 • 319 Ross Avenue
Alamosa, CO 81101-0120
Telephone (719) 589-3666
Fax (719) 589-4627

Richard J. Jacobs*
Margaret J. Russell

*Also Admitted in Arizona

March 9, 2001

Donald Shank, President
Denver & Rio Grande Railway Historical Foundation
1474 Main Avenue, Suite 223
Durango, Colorado 81301

Re: Commercial Lease, dated February 15, 2001; Lawrence Basky

Dear Mr. Shank,

Lawrence Basky has retained our services concerning the proposed lease, and has asked us to respond to your letter of February 15, 2001. Mr. Basky has instructed us to inform you that he will not sign the proposed lease, nor any other lease with your company, and he will not pay "rent" to your company. This is because we do not believe that the company owns any interest in the property to lease.

Furthermore, you are hereby expressly notified that our client does not consent for your company, its employees, agents, owners or contractors to enter upon any portion of the premises known as 111 Main Street, Creede, Colorado. Any effort to exercise self-help to occupy or take possession of any portion of the premises will be dealt with immediately and harshly.

Please direct any further correspondence on any issues pertaining to the Creede property directly to our office, and do not directly contact our client. We will be happy to discuss any issues raised by this letter or that could lead to a resolution of the present conflicts.

Very truly yours,

JACOBS & RUSSELL, LLC

By Peg Russell
Margaret J. Russell, Esq.

MJR/pv
cc: Client

FILE

LAW OFFICES
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THOMAS F. MCFARLAND, JR.
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STEPHEN C. HERMAN
scherman@aol.com

April 6, 2001

Margaret J. Russell, Esq.
Jacobs & Russell, LLC
P.O. Box 120
319 Ross Avenue
Alamosa, CO 81101-0120

Re: Proposed lease of land - Lawrence Basky

Dear Ms. Russell:

This refers to your letter of March 9, 2001 to Donald Shank, President of the Denver & Rio Grande Railway Historical Foundation ("the Foundation") about the above subject. I am responding to that letter as attorney for the Foundation.

You take the position in your letter that Mr. Basky is not legally required to enter into a lease of land with the Foundation because the Foundation does not own any interest in the property to lease. For the reasons explained below, that position is not legally correct. I request that you reconsider that position.

The Foundation's interest in the involved land is an easement for a railroad right-of-way, i.e., a railroad easement. The Foundation acquired that interest from Union Pacific Railroad Company (UP) for valuable consideration. That acquisition was consummated on May 24, 2000. It had been approved by the U.S. Department of Transportation, Surface Transportation Board, in May, 1999. UP had acquired that interest as part of its acquisition of Southern Pacific - Denver & Rio Grande Western

Unlike all other private easements and most commercial easements, a railroad easement is exclusive as against the fee owner. *Pipes, Wires, and Bicycles*, 27 Ecol. L. Quart. 351, 397, *Railroad Easement-Exclusivity*, (U Cal. Berkeley, 2000). A railroad easement entitles a railroad company to the exclusive use and occupancy of affected land. *Id.* at 401; *Midland Valley R.R. Co. v. Sutter*, 28 F.2d 163, 167-168 (8th Cir. 1928). Consequently, if there is an unauthorized use of affected land, a railroad company may bring an action for ejectment, which power is unique among easement holders. *Pipes, Wires, and Bicycles, supra*, at 398; *Railroad Right-of-Way - Nature of the Interest - Easements - Ejectment*, 30 Or. L. Rev. 380, 380-384 (1951). Consistently with the exclusive nature of a railroad easement, a railroad company may lawfully

McFarland & Herman

Margaret J. Russell, Esq.
April 6, 2001
Page 2

lease portions of the right-of-way land over which it has an easement for uses that are not inconsistent with railroad use. *Pipes, Wires, and Bicycles, supra*, at 424; *Mellon v. Southern Pac. Transp. Co.*, 750 F.Supp. 226 (W.D., Tex., 1990).

Based on the foregoing, it is clear that the Foundation has a sufficient property interest in the involved land to lease such land to Mr. Basky. The foregoing also makes it clear that as the holder of a railroad easement in the involved land, the Foundation has the authority to bring an action to eject Mr. Basky from the land if Mr. Basky continues to use such land without paying compensation to the Foundation. If the Foundation were to be forced to bring such an action because of Mr. Basky's continued refusal to sign a lease and pay rent, Mr. Basky would be required to vacate the involved land, including removal of all improvements and personal property.

Please advise whether Mr. Basky continues to disclaim a legal obligation to lease the involved land and pay rent.

Very truly yours,

Tom McFarland

Thomas F. McFarland, Jr.
Attorney for Denver & Rio Grande Railway Historical Foundation

TMcF:kl:d:wpk.0\797\ltrmfr1

cc: Don Shank

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Honorable Lewis T. Babcock
Chief United States District Judge

Honorable Craig B. Shaffer
United States Magistrate Judge

CIVIL ACTION NO. 01-B-0318

DEPOSITION OF DONALD H. SHANK

CITY OF CREEDE,
a Colorado Municipal Corporation,

Plaintiff,

vs.

DENVER & RIO GRANDE RAILWAY, HISTORICAL FOUNDATION, a Colorado Not-For-Profit Corporation, and DONALD H. SHANK,

Defendants.

PURSUANT TO NOTICE, the above-entitled deposition was taken on behalf of the Plaintiff at 44 Cook Street, Suite 1000, Denver, Colorado, on June 21, 2001, at 10:47 a.m., before Jana Mackelprang, Registered Professional Reporter, Certified Realtime Reporter, and Notary Public.

CALDERWOOD-MACKELPRANG, INC. (303) 477-3500

APPEARANCES:
For the Plaintiff:
GEORGE M. ALLEN, ESQ.
206-A Society Drive
Telluride, Colorado 81435
(970) 369-1000
E-mail: alnoma@yahoo.com

For the Defendants:
RAYMOND P. MICKLEWRIGHT, ESQ.
Wolf & Slatkin
44 Cook Street, Suite 1000
Denver, Colorado 80206-5827
(303) 355-2999
E-mail: raymicklewright@hotmail.com

Also present:
B.J. Myers

EXAMINATION INDEX

BY MR. ALLEN Page 3

EXHIBIT INDEX

FOR IDENTIFICATION	REFERENCE
Deposition Exhibit 1 Printout of an unofficial website for Denver & Rio Grand Railway Historical Foundation	38

PROCEEDINGS

WHEREUPON, the following proceedings were taken pursuant to the Federal Rules of Civil Procedure.

* * * * *

DONALD H. SHANK,

having been first duly sworn to state the whole truth, testified as follows:

EXAMINATION

BY MR. ALLEN:

Q. Please state your name.
A. Donald Shank.
Q. Your address?
A. 204 St. Andrews Circle, Durango, Colorado 81301.
Q. Is that your residence, business, or both?
A. Residence.
Q. Do you have a business address that's different from that?
A. Yes, I do.
Q. What is that address?
A. 1474 Main Avenue, Suite 223, Durango.

Q. What is the telephone number at the residence, and what is the telephone number at the business?
A. Residence, (970) 259-5119; office, (970) 259-9498.
Q. What's your date of birth?
A. 6/20/49.
Q. Social Security number?
A. 557-84-2549.
Q. What is your relationship to the Denver & Rio Grande Railway Historical Foundation?
A. I'm its founder, board chairman, president.
Q. Are you what we would call the chief executive officer of the Foundation?
A. I am its board chairman, its president, and its founder.
Q. Is there any other executive officer of the Foundation other than yourself?
A. No.
Q. So you are not only chief executive officer, you are its executive officer, the only executive officer?
A. We have a board. We have officers.
Q. With regard to the Creede branch of

what was formerly known as the Denver & Rio Grande Western Railway, is the Foundation presently providing interstate common carrier by rail?
A. At present, no.
Q. I'd like you to describe what activities the Foundation has carried out with respect to dealing with shippers or potential shippers on the Creede branch.
A. Our interface with shippers at this time has been minimal. We are in a rehabilitation phase on the railroad, with a target date yet to be determined as far as the railroad being operational and meeting FRA guidelines.

We didn't want to get the cart ahead of the horse and offer something to someone that we can't deliver.

Q. Have you -- let me back up. I'm going to try to be disciplined about referring to the Foundation, because I perceive it's the Foundation and not Donald Shank, which is the entity which has the rights under the offer of financial assistance. Is that a fair characterization?
A. The Foundation is the legal owner.
Q. So I have a tendency to slip into the use of pronouns, such as "have you," and if the

context of that is that I'm clearly probably talking about what the Foundation is doing rather than what

you are personally doing, I apologize for the ambiguity; but what I am driving at throughout the course of this deposition, unless I tell you otherwise, is information regarding the Foundation and its activities. And if, from time to time, I say, "have you," when the context would indicate what I'm really talking about is has the Foundation done something, filed something, built something, whatever, try to bear with me on that.

Let me back up and ask a couple of prefatory questions. You're in good health right now?

A. Yes, I am.

Q. Are you suffering from any condition or affliction or illness or taking any medication or in any other way dealing with any circumstance that would impair your ability to hear and understand and answer the questions that I ask of you?

A. No, other than I'm very tired.

Q. Tell me about "very tired," because that can have a bearing. How much sleep have you had, say, in the last 24 hours?

A. Three hours.

Q. Did you drive up from Durango?

A. I drove up from Laughlin, Nevada.

Q. Where is Laughlin? West of Las Vegas?

A. Yes.

Q. So I-15 to I-70?

A. I-15 to I-40 to I-25.

Q. In a straight shot?

A. 15 to 16 hours of driving yesterday.

Q. So I can quit feeling sorry for myself about what Frontier Airlines did to me last night?

A. Yeah, I should be so fortunate.

Q. So you were sitting there holding a wheel?

A. That's correct.

Q. Putting a lot of the western United States under you as you got here?

A. That's correct.

Q. If you don't understand something I ask you --

A. I'll ask for clarification.

Q. -- ask me to clarify it, and I'll try to do so.

Have you previously participated in a deposition or any circumstance where your testimony was taken under oath?

A. Yes.

Q. Could you describe briefly those

circumstances, the kind of case, how you happened to be testifying?

A. I was in a deposition approximately two or three months ago. A railroad related issue, but not pertinent to this railroad.

Q. Can you tell us what railroad and how you came to be testifying?

A. It's regarding the Durango & Silverton, which is the railroad in Durango, Colorado. And I was subpoenaed in as a witness.

Q. Were you a party in the litigation?

A. Only as a witness.

Q. A party means either the plaintiff or the defendant or a third-party plaintiff or third-party defendant or something like that. I take it you were none of those?

A. Simply as a witness. It's a very convoluted case, and I don't know all the particulars. I'm not going to go into all the particulars on it. I was in a deposition in the last few months.

Q. The reason I'm pursuing this is it may bear on your experience with railroads. I don't

want to get into it deeply. Give us a thumbnail sketch of what the case was about and how you

happened to be a witness.

A. It's over the manner in which First American Railways, ultimately American Heritage Railways, purchased the Durango & Silverton, and it's over a malpractice suit between a law firm and another. And at one point, I was an active buyer of that line, so my testimony was deemed important to the case.

Q. Did you actually buy that line?

A. No.

Q. Have you either directly or through any entity in which you were a participant or whatever bought any other rail lines other than the rail line that's at issue in this litigation?

A. Again, you're saying "I." It's the Foundation --

Q. This one, I do mean you. Have you personally or the Foundation ever been involved in the purchase or have any ownership role of any other rail lines other than this one?

A. No.

Q. I want to go back to shippers. What context, if any, have either you personally or the

Foundation had with any prospective shipper?

A. I have had dialogue with a couple

different individuals who have expressed a desire, at some point in time, to be able to ship product on the railroad.
Q. Who are the individuals?
A. I don't have their names in front of me, and I do not recall at this moment. One of them resides in Del Norte. Another one called me from Creede for some potential aggregate business.
Q. What was the nature of the business or product that might have been shipped by the Del Norte shipper?
A. Aggregate, rock.
Q. Rock, I understand.
Let me ask you about some Creede businesses. Have you had any communication or contact with Tompkins True Value Hardware with regard to shipping anything in which they're involved, lumber, building products, anything of that nature?
A. Not at this time.
Q. Have you or the Foundation ever had any such contact with Tompkins?
A. I have had contact with Tompkins.

Q. With regard to potentially shipping?
A. No.

Q. What is your perception at this time as to whether or not Tompkins True Value is or is not a potential shipper of freight over the Creede branch?
A. I think that possibly, at some point in time, they could become a potential shipper and receive lumber and building materials within the City of Creede.
Q. But, at this time, you don't have any quantified -- "you," meaning you or the Foundation -- do not have any quantified or defined undertaking by them to ship anything; is that a fair statement?
A. Yeah, at this time, we do not.
Q. So if we were to ask, will that business be a shipper on the Creede branch, at least as of right now, the answer would have to be negative, as far as we know?
A. I wouldn't say that. Potentially, they could become a shipper on the line. At this moment, they are not. We have not entered into dialogue along those lines because, as I stated earlier, we're not sure as to what date we're going to have the line rebuilt. We've had a number of setbacks.
Q. At this point in time, it would not be

possible to quantify in either tonnage or volume or dollar value or dates anything with relation to what

Tompkins True Value Hardware might ship; is that a fair statement?
A. That's a fair statement.
Q. Would the same statement be true with regard to Double D Log Homes?
A. That's a fair statement.
Q. Would the same statement be true with regard to Kolisch Lumber?
A. At this time, uh-huh, fair statement.
Q. Would that be a fair statement with regard to Kentucky Belle Market?
A. That's a fair statement.
Q. Would that be a fair statement with regard to Silver Dollar Liquor?
A. Yes.
Q. A fair statement with regard to Creede Country Club?
A. Yes.
Q. A fair statement with regard to Rare Things?
A. Oh, yes.
Q. A fair statement with regard to San Juan Sports?

A. Uh-huh, yes.
Q. Rather than require an answer case by

case for about 10 businesses, I'm just going to read them all off. I'd like you to wait until I have. If there are any that that would not be a fair statement -- Mountain Memories, Creede T-Shirt Company --
MR. MICKLEWRIGHT: I'll object to the form of this question. If you'd frame this first in the form of a question.
MR. ALLEN: Yes.
Q. (By Mr. Allen) With regard to the prior series of questions, that is, would it be a fair statement at this time that you cannot quantify either by volume, weight, dollar value, or potential time of shipment any prospect of shipment, I want that question answered with regard to the following businesses, which I shall enumerate: Mountain Memories, Creede T-Shirt Company, Quiller Gallery, Ramble House, Abbey Lane Gallery, Amethyst Emporium, Holy Moses, Basky Gallery, Creede Gallery, Mountain Home Accents, Creede Trading Post.
A. I have not spoken with any of those.
Yes, that would be a fair assumption at this point.
Q. Now, going outside of Creede, with

regard to South Fork, are there any businesses or government operations or anything else that might

have implications of shipping freight in the South Fork area as to which the last question would not be a fair statement?

A. I have not spoken with anyone down there.

Q. So, then, with regard to all of the businesses presently being carried out in the South Fork area, it would be fair to say, would it not, that you could not say at this time --

A. Excuse me.

Q. Sure.

(Interruption in the proceedings.)

Q. (By Mr. Allen) So, to recapitulate, it would be a fair statement that with regard to, so far as you know, all of the businesses in the South Fork area, you could not at this time quantify any potential weight, volume, dollar value, or time at which any of them might be shippers over the Creede branch?

MR. MICKLEWRIGHT: I'll object to the form of the question.

MR. ALLEN: I'm happy to rephrase. Why don't you give me your objection.

MR. MICKLEWRIGHT: I don't want to do any talking objections, but you used the word

"potential." And there's a difference between what is today and what might be in the future.

MR. ALLEN: Sure, but what I'm trying to get at is present knowledge, Ray. What I'm trying to do is say as of this moment today. I recognize that tomorrow BMW may decide to manufacture automobiles in South Fork and have huge requirements to build a 200,000-square foot factory and employ 3,000 people and have all kinds of shipping requirements. So anything is possible. What I'm talking about is present knowledge as to anyone who has been identified thus far as to actual quantitative information, that is, the volume they might ship, the weight they might ship, the dollar value of what they might ship, or when they might ship.

MR. MICKLEWRIGHT: I think that's the question you mean to ask, but the way in which it's phrased is ambiguous, because I think each one of the people on the list that you've enumerated is a potential shipper. Are they shipping now -- I think you're meaning to ask are they shipping now? And his answer is no, they're not.

MR. ALLEN: Right, and then my next question, and the heart of this is, is there any

present knowledge with regard to any specifics that might relate to them for any shipping they might do in the future?

What I want to do is not merely say everybody in the world might be a shipper. I want to be able to say there is no present knowledge in terms of weight, volume, dollar value, or time of potential shipment as to anyone.

Q. (By Mr. Allen) Let me start with the omnibus question which I usually put at the end, let's do it now: Is it a fair statement as to the entire world, that at the present time, neither you personally nor the Foundation can make any statement with any specifics as to the weight of what might be shipped, the volume of what might be shipped, the dollar value of what might be shipped, or the time of when anything might be shipped as to any potential shipper?

A. At this time, we do not have any specifics as to weight, volume, rate, et cetera. As I said, we have had preliminary dialogue with a couple people, but, again, we want to make sure that, one, we are going to get this railroad rebuilt

and in a timely manner and establish an operational date to where we can go to these people and say, We

will be able to deliver goods on such and such a date, and be able to adhere to that, rather than guessing for next year, but it's really going to be two. We want real numbers for people because I don't want to offer something that we can't deliver.

Q. That means as of this moment, while you contemplate an undertaking to rehabilitate the rail line, you don't have any specific knowledge as to what freight may be shipped over it; is that fair to say?

A. Correct, that's fair to say.

Q. You don't have any knowledge as to what the revenue yield from shipping any such freight might be?

A. We have not established it at this time.

Q. Does the Foundation have any tariffs on file with the STB, Surface Transportation Board, with regard to freight shipment at the present time?

A. Not at this time.

Q. Has the Foundation done anything toward development of filing of tariffs?

A. Not at this time.

Q. Has the Foundation contracted with, hired, interviewed, or otherwise communicated with

any person who has special knowledge or expertise with regard to formulating freight tariffs?
A. Not at this time.
Q. When you say, "Not at this time," with regard to your last several answers, does that also take into account all of the time leading up to now?
A. That would be correct.
Q. So, at no point, has the Foundation ever contracted with, interviewed, hired, or otherwise communicated with anyone who has specialized knowledge or expertise with regard to promulgating freight tariffs?
A. Let me correct that statement. That's actually not accurate. I have had a number of conversations with Fred Jones from Rock and Rail. Fred is chief operating officer for them.
Q. They're operating the rail line out of Canon City, through the Royal Gorge?
A. Correct.
Q. Please describe the nature of those conversations.
A. Fred and I have had a number of conversations regarding potential freight business

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in and out of the San Luis Valley. Obviously, we want to cultivate business on the Creede branch, but

at a time when we can deliver. Fred and I do maintain a good working relationship, and we will be enhancing that relationship through a business arrangement in the near future. Again, we are looking at acquiring additional rights-of-way moving east in the San Luis Valley, with hopes of cultivating freight business on that portion of the line as well.

Fred, being a former Union Pacific employee for a number of years -- he's 37 years in railroading -- recognizes additional potential to freight business in the San Luis Valley, and that's clearly one of the things that we have discussed.

Q. What is his full name?
A. Fred Jones.
Q. How would one go about contacting him?
A. Call Rock and Rail.
Q. And where are they?
A. Their office -- their main office is in Colorado Springs. Typically, you can contact Fred by cell phone. I don't have his card with me, but I can get you that number. Or just call information for Rock and Rail Railroad. I'm sure they'll track

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him down for you.
Q. They are located in Colorado Springs?

A. I believe that's where their main office is. I've always met Fred over in Pueblo.
Q. Do you have any objection to my calling him or someone working on my behalf calling him and asking him about the discussions that he's had with you?
A. No.
Q. We wouldn't be revealing any confidential information or trade secrets?
A. If there's any proprietary information there, I would be sure that Fred would hold it.
Q. Does he know that your deposition is being taken in this case today?
A. No.
Q. How recently have you had discussions with him regarding freight rail activity in the San Luis Valley?
A. Fred and I talked probably two weeks ago.
Q. Please describe, if you would, the present nature of freight rail activity in the San Luis Valley.
A. Freight rail activity in the Valley at

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the present time is handled by the Union Pacific Railroad. They handle the perlite plant in

Antonito.
Q. Let me back up a little, because this is an area I really don't know anything about. Where does rail service connect from the San Luis Valley to the world beyond the Valley?
A. Walsenburg.
Q. So it goes out of the Valley to the east --
A. It goes from Alamosa east to Blanca, Fort Garland, over La Veta Pass, through the Town of La Veta, and down to Walsenburg on the Front Range.
Q. That's on an old D&RG?
A. It's all part of the old D&RG.
Q. Where does it connect?
A. North-south line goes over to Pueblo, down to Trinidad.
Q. Is there presently regularly scheduled freight rail service over those lines?
A. Yes.
Q. With what frequency?
A. Daily, at least the line -- the run over La Veta Pass into the San Luis Valley is daily.
Q. Are any of those services unit trains

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hauling either ore or coal?
A. Not the one over La Veta. Coal trains

Q. Are animals taken out of the Valley completely to -- the floor elevation of the Valley -- I'm sorry, I'll withdraw that question -- the floor level of the Valley is mostly over 7,000 feet?
A. Correct.
Q. Alamosa is 7500 feet above sea level?
A. I'm not sure what it is, but it's up there.
Q. And Creede is at about 8800 feet in elevation?
A. Correct.
Q. And I take it summer range or summer pastures lie further up the Rio Grande Valley from Creede; is that fair to say?
A. I believe that's fair to say.
Q. So assuming that animals are pastured for the winter in the San Luis Valley -- I don't know if that assumption is fair or not, but for purposes of our discussion, I want to make it -- assuming that they are pastured for the winter in the San Luis Valley, and then it's desirable, for the summer, to get them up to higher elevations, to do that, if cars could be found, railcars suitable

for livestock could be found, the animals would have to be loaded somewhere down in the Valley, Del

Norte, Monte Vista, Alamosa, Center, et cetera; isn't that correct?
A. Somewhere in the Valley.
Q. They'd have to be either driven to or trucked to the loading point on the railroad, correct?
A. Correct.
Q. Then they could ride railcars, if the cars could be found, to Creede, if you had the line open to Creede, correct?
A. Correct.
Q. Then to get farther up the Valley from Creede, they would again need to be either trucked or driven; is that correct?
A. Correct.
Q. And the Rio Grande Valley actually goes up valley from Creede some fairly significant distance, does it not?
A. Quite a few miles.
Q. It goes all the way up to the headwaters on Slumgullion Pass?
A. Correct.
Q. Do you happen to know that distance?

A. I don't.
MR. ALLEN: We have -- sitting on my

left is B.J. Myers, who's the mayor of Creede. Let me ask you: How far is it from --
MS. MYERS: That's not the headwaters. The headwaters are actually above the Rio Grande Reservoir. Sun Valley from Creede is probably 30 miles.
MR. ALLEN: Okay.
Q. (By Mr. Allen) Mr. Shank, accepting -- so going upstream or up the highway, up Colorado Highway 149 from Creede, one would be in pastureland pretty much all the way to the top of Slumgullion Pass; isn't that right? There may be the --
A. There's a lot of private homes, private ranches up through there. To say it's all pastureland, I wouldn't make that assumption; I wouldn't make that statement.
Q. There's a lot of potential pastureland as one goes up there; would that be fair to say?
A. There is definitely some potential pastureland.
Q. And most landowners like to have grazing leases on land because that way they can keep agricultural status for tax purposes?

A. Right.
Q. So it's attractive to landowners to

have animals pastured on his or her land for summer grazing because that can maintain agricultural tax status of the land?
A. It can be. I'm not going to make an assumption for them.
Q. But coming back to reality for you and the Foundation for operating the Creede branch, right now, other than this one conversation you had with a man who was driving his sheep past you, it is a fair statement that you have had no other communications with regard to shipment of livestock on the Creede branch?
A. That's correct.
Q. And, at present, you could not quantify as to weight, volume, dollar value, or prospective time of shipment anything with regard to shipment of livestock on the Creede branch?
A. That's correct.
Q. What dollar volume needs to be generated from shipment of interstate freight on the Creede branch in order to pay the cost of rehabilitating the Creede branch and putting it in service and of operating the freight rail service

once it is in service?
A. I don't have that figure in front of

me.
Q. Does such a figure exist?
A. Not at this time.
Q. Have any plans been formulated to undertake to develop a projection or a pro forma statement of the number of dollars that will be required to be generated from interstate common carriage of freight in order to support the freight rail operations of the Creede branch?
MR. MICKLEWRIGHT: Objection, ambiguous question.
Q. (By Mr. Allen) I'd like you to try to answer it, if you could.
A. I'd like you to rephrase the question. You lost me somewhere along the line.
Q. Sorry. I'll try to do better.
What specifics has the Foundation done, if any, to move toward putting together a projected number for the amount of money it needs to generate on some recurring revenue basis, monthly, annually, whatever, daily, what has been done by the Foundation, if anything, to come up with the number of dollars that will be required to be generated on

a recurring revenue basis from shipment of freight in order to pay for the costs, the two implicit

costs, one, rehabilitation of the line and putting it in shape to carry traffic; and, two, the ongoing operating costs of carrying freight rail traffic?
A. As far as breaking it down as to what our freight revenues need to be to offset those costs, we don't have those figures at this time. As a charitable foundation, we have been in a fund-raising mode to do an assemblage of funds, to aggregate funds, for the rehabilitation of the line. But, of course, during all this litigation and mud-slinging, if you will, by the City of Creede, it's been very difficult to get into a fund-raising mode.
Q. Has this litigation, meaning the lawsuit that I filed back in November 2000, adversely affected the ability of the Foundation to carry out common carriage of freight, interstate freight shipments, by rail?
A. Yes, we've been damaged by the filing of the suit.
Q. In what way?
A. Well, initially we lost a very real investor in the railroad, a family from Texas that

was in their due diligence period. Upon the filing of the suit, upon that fact becoming aware of, their

attorney performing due diligence -- it was the recommendation of the attorney to withdraw from the transaction.
Q. Please describe what the transaction would have been.
A. It was three brothers and the father bringing substantial cash into the Foundation, into the business, which would have facilitated rehabilitation and equipment acquisition.
Q. Please name the three brothers and the father.
A. Their last name is Kimbrell, K-i-m-b-r-e-l-l. The brothers were Sean, Casey, and -- the third brother's name escapes me for the moment. The father's name is Don.
Q. Where are they --
A. Texas.
Q. Where?
A. Sunray.
Q. What part of Texas is that?
A. It's up near the border, the northern border of Texas.
Q. Do you have a telephone number or an

address for them?
A. Not with me.

Q. How about an area code?
A. Not with me.
Q. Do you recall the area code?
A. No, I don't.
Q. If I threw out a few Texas area codes, would any of them happen to sound likely?
A. Probably not this morning.
Q. 713 is Houston.
A. No, it's not that. It's not 214; it's not Dallas.
Q. 972, Dallas suburbs?
A. It's way up close to the border.
Q. Oklahoma?
A. Either Oklahoma or New Mexico. I was never down there. They were up often.
Q. How much money were they going to invest?
A. Between 4 and 4.5 million.
Q. In what form was that investment to come to you? All cash?
A. All cash.
Q. What would they have gotten in return for the investment?

A. They would have gotten a substantial portion of the operating company.

Q. Is the Foundation the operating company?
A. No, the Foundation is the legal owner of the right-of-way.
Q. Is there an operating company?
A. The operating company will be the Denver & Rio Grande Railway, the original name.
Q. Who owns the rights to that name right now?
A. I do.
Q. How did you -- did Union Pacific assign that as part of the purchase?
A. No, they did not.
Q. How did you come to own the name?
A. I contacted the Secretary of State, Department of Corporations, and asked them if the name was available. They said Denver & Rio Grande Western was taken, but that that was a name that was effectively going to disappear as it merged with the Union Pacific. I asked if Denver & Rio Grande Railway was available. She said, "Yes, it is," so I filed articles.
Q. So do you have -- is there a

corporation in existence called Denver & Rio Grande Railway?

A. There is.
Q. Is it a for-profit corporation?
A. It's a Colorado C corp.
Q. C corp is its tax status.
A. It's a for-profit corporation.
Q. Who is the shareholder, or who are the shareholders?
A. Myself.
Q. Has that corporation ever had any income?
A. No.
Q. Has it actually issued shares of stock?
A. No, it has not.
Q. Has it filed annual reports?
A. No, it was simply set up to be the operating company for the railroad, under a lease agreement with the Foundation.
Q. Is there a lease agreement between the Foundation and the corporation?
A. Yes, there is.
Q. Who drew the lease?
A. Myself.
Q. Did you have legal assistance from a

lawyer?
A. It's been reviewed by a lawyer.

Q. Are you a lawyer?
A. No.
Q. Could you describe your educational background briefly.
A. A couple of years of college.
Q. At what institution or institutions?
A. Mount San Antonio College in California.
Q. Where is that? That's a really familiar name.
A. Pomona. Walnut to be exact. If you say Walnut, nobody knows where that is. It's right next door to Cal Poly.
Q. Cal Poly-Pomona, not Cal Poly-San Luis Obispo?
A. Right.
Q. Mount San Antonio relays, right?
A. It's a track college.
Q. It was always a sort of stop on the tour back when there was a major track and field competition in the United States.
A. That's correct.
Q. Are you a former runner?

A. Yes.
Q. Are you still a runner?

A. When I get the chance.
Q. Did you run in competitions?
A. At times, I did.
Q. What events?
A. I was a hurdler; I was a miler.
Q. What kind of mile time?
A. 4:18.
Q. Wow. I'm impressed.
A. Thank you. That's a lot of years ago.
Q. Well, my best mile was 4:40.6. And after that, it was all shin splints and beyond.
So a couple of years at Mount San Antonio. Anywhere else for college education?
A. No, I was then taken into the service.
Q. What branch?
A. California National Guard.
Q. Did you see action anywhere?
A. Yeah, I sure did. We won't go into that. I transferred from the California National Guard to the Colorado Army Reserve.
Q. Are you a Vietnam veteran?
A. No.
Q. You did not serve outside the United

States?
A. Did not serve outside the U.S.

Q. Were you on active duty, though?
A. Yeah, at one point, I was. Honorably discharged in March of '71.
Q. Okay.
(Deposition Exhibit 1 was marked.)
Q. (By Mr. Allen) I've handed you what's been marked as Exhibit 1. Do you recognize what that is?
A. Yes.
Q. What is it?
A. It is a printout of an unofficial website on behalf of the Denver & Rio Grande Railway Historical Foundation.
Q. When you say, "unofficial website," why unofficial?
A. Because this is not a Foundation website, per se. This was done by Richard Cutter, to the benefit and on behalf of the Foundation.
Q. Well, if it had ever reached a point that the URL -- do you know what I mean by "the URL"?
A. (Nods.)
Q. -- that the URL had value, who would

have owned the URL for this website?
A. This particular one would have been

owned by the Cutters.
Q. Were there any other websites, or are there any other websites that pertain to the Foundation?
A. There was a website that we were going to generate. It was Rio-Grande.org. We tried to keep the name as short as possible. Rio Grande was gone, so it was Rio-Grande.
That was simply a one-page. I was waiting for my son to develop that as he was learning working for a company in California.
Q. Did you ever light it up and go active?
A. It lit up with one page, just gave a very brief statement about the Foundation and the line to Creede, and that was it. It never got expanded.
Q. Is it still active now?
A. At the time we were effectively ordered to remove all information regarding fund-raising from the Internet, that page was blipped out. I don't even know if it's even an active page at this point. We've got a couple of domain names. At the time, we were told to cease and desist from

fund-raising.
Q. I take it that you were told to cease

and desist by your own legal counsel; is that right?
A. That's correct. My understanding was that it was an agreement with you.
Q. Turning your attention to page 2 of Exhibit 1, this has, I take it, a form that one could have printed out and returned to someone in order to become a member of the Foundation; is that right?
A. That's correct.
Q. Does the Foundation have members?
A. Yes, it does.
Q. And have the members become members because they have paid something into the Foundation?
A. Most have. There have been some comp memberships, but most have paid a membership fee.
Q. Has the aggregate of those payments created a capital fund that is available to bear the costs of rehabilitating and activating the Creede branch in order to be able to carry interstate freight rail service?
A. Not at this time.
Q. Is there any capital fund at this time

that is available to bear some part of the cost of rehabilitation and establishment of the Creede

branch in order to carry interstate freight rail traffic?
A. There is a fund, but it is not capitalized at this time.
Q. What do you mean by that?
A. We had some commitments for funding for a significant portion of the rehabilitation; but as I stated earlier, the lawsuit, the pending litigation, the continual negative feedback from the Town of -- not from the town, but from certain members of Creede.
When we say, "Creede is against the train" -- you don't say that. We've been certainly corrected, as the city council has been corrected, because it's not the whole town that's against the railroad. So certain members of the City of Creede are opposed to the railroad, and they've certainly let that be known as publicly and as far and wide as possible.
I believe Sandra Wright, city manager of Creede, went so far as to write an article, write a letter to some of the national railroad magazines, and specifically stating the town's position that

they don't want it, that they felt that the railway was going to ruin the town, and trying to cite their

positions, their feelings. And all of these things are very, very damaging to our project, to fund-raising for the project.
Q. Do you conceive the project, that is, trying to reactivate the rail line, as being a matter of public interest in the Creede community?
A. It's a matter of public interest in all the communities in the San Luis Valley.
Q. It is fair to say, is it not, that you are a figure who is -- you, Donald Shank, are a figure generally associated with this?
A. I am.
Q. And, therefore, to that extent, you're a public figure?
A. To a certain extent.
Q. Well, if I said I consider you a public figure, you're someone who gets your name in the newspaper, people know about you who haven't met you; that's fair to say?
A. I've been in the newspaper a number of times, yes. Therefore, I would be a public figure.
Q. You agree, do you not, with the proposition that other people who live in the San

Luis Valley or, for that matter, anywhere else in the United States have a right to freely express

their own views, whether in print or orally?
MR. MICKLEWRIGHT: I'm going to object to this line of questioning because I think it exceeds the scope of the issue that I think you are going toward, which is rehabilitation. If we want to talk about the discourse and elements of a defamation action, I don't think this is the appropriate format to do that. It's a waste of our time.
Q. (By Mr. Allen) If the investment that you contemplated from -- what was their name? The Kimbrells?
A. Yes.
Q. -- had actually materialized, that would have generated a very significant amount of money, several millions of dollars, correct?
A. Correct.
Q. And they would have been investors in the C corp that you've established; is that right?
A. They would have been involved in both the Foundation and the C corp.
Q. Was documentation generated with regard to that prospective investment?

A. Yes.
Q. Do you know what I mean by a private

placement memorandum?
A. I know what you mean by that.
Q. Was a private placement memorandum generated either as a final document or as a preliminary draft?
A. I have to think back. I don't think the PPM was generated. I know there was an agreement. All the documentation had gone before their attorney, and things were working very well at that time, until such time as the lawsuit was filed.
Q. Who is their attorney?
A. I don't know her name now. It's a lady in Pueblo.
Q. Is she in a firm in Pueblo?
A. She is.
Q. Does she practice with Tom Farley in Pueblo?
A. I don't know.
Q. Do you know Tom Farley?
A. No. The only Farley I know is an appraiser.
Q. Directing your attention to page 4 of 5 of Exhibit 1 -- there are numbers at the top; it's

in the last part of the document -- you see a heading there that says, "*D&RG RY Tie Certificate"?

A. Yes.
Q. I take it this isn't talking about a necktie that you wear around your neck.
A. No, this is talking about a railroad tie.
Q. So what you're saying here is somebody could buy a railroad tie?
A. Correct.
Q. For $70; is that right?
A. It's $45.
Q. $45 nonframed?
A. You get a certificate with it. And if you want it framed, then it's $70.
Q. So this would have sold them a tie that, at one time, had been in use on the line?
A. No. This would purchase a new tie to the railroad. In other words, it's a replacement tie to replace one of the worn-out ties on the railroad.
Q. The framing is the certificate. I got it. I figured it out. I'm sorry. The framing would be the certificate, not the tie?
A. Correct.

Q. I was having a very hard time contemplating how you would frame a railroad tie.

Did you sell any?
A. Uh-huh.
Q. How many?
A. I'm not sure what the number is right now.
Q. Ballpark?
A. Oh, ballpark, probably somewhere in the vicinity of 100.
Q. So at 45 bucks apiece, that should have generated $4500?
A. Correct.
Q. More if they wanted certificates?
A. The certificate you got regardless. It was whether or not you wanted the framing.
Q. Where and how was the money that came from the sale of those ties held, or did it simply go to buy the ties?
A. It went to buy ties. It went to process certificates and mailing.
Q. Have the ties actually been bought?
A. Some have. They are out there on the railroad. They are not installed. They're just stacked on the railroad.

Q. Where do you go when you want to buy railroad supplies?

A. Pioneer, railyards, railroad supply stores.
Q. How do they get there?
A. We truck them in.
Q. Are they ever shipped in by rail?
A. They can be, if you have enough quantity. It's more cost effective to bring them in by rail.
Q. How many ties are needed in order to reestablish rail service on the Creede branch?
A. Under FRA regs, there's a Class 2, and that's a grade level. This is not the same -- it's the classification of rail rehab. It will be done as a Class 2 railroad, which is a 25 miles an hour maximum speed. That calls for eight good ties -- and if you want to get into the classification of good ties, we can discuss that -- eight good ties per rail length in a tangent or straight section.
Q. How long is a rail length?
A. 33 to 39 feet, depending upon the weight of the rail.
Q. What weight is that rail?
A. It varies. It's between 65 and 90.

And there's some 115 pounds.
Q. What weight does it need to be in order for you to establish service on it?

A. We can establish a 65-pound. I've had a rail inspector from the Union Pacific come out, and he said, "Don't get in a hurry to replace that 65-pound rail. That's very damn good rail." We've had very little breakage with that, as opposed to some of the 85- and 90-pound rail.
Q. Who is that inspector?
A. Hispanic gentleman out of the Valley. I forget his name.
Q. He works for Union Pacific in the Valley?
A. He does.
Q. He's a full-time employee now?
A. He is.
Q. Where in the Valley does he work?
A. He works on that division, so he works on the whole Valley.
Q. Is he the only rail inspector that Union Pacific has?
A. No.
Q. How many rail inspectors do they have?
A. I have no idea. We're talking about

thousands upon thousands of railroad.
Q. How many in the Valley?

A. In his formal position, I think he's the only one in there. Within a section crew, there's going to be other men who are qualified, but as an actual rail inspector, he's their man.
Q. But you asked him to come up and inspect your railway?
A. I asked him to look at some stuff.
Q. And he did so?
A. Yes.
Q. Was he compensated for that?
A. No.
Q. Was there any written communication back and forth with him?
A. No. This was done as a friendly accommodation.
Q. How long ago was that done?
A. Last year.
Q. When last year, do you remember?
A. Last summer. I'm not sure what month.
Q. Can you remember his first name?
A. I am sorry.
Q. Did you meet with him in person?
A. Yes.

Q. Were you there?
A. Yes.

Q. You and he were both there?
A. Uh-huh.
MR. MICKLEWRIGHT: You've got to say "yes" or "no."
THE DEPONENT: Yes. I met him -- initially, I believe it was in Fort Garland. I talked to a couple other guys there on the section crew. He drives what's called a high-rail. It's a pickup truck with railroad wheels that come down so the truck can go down the tracks. And he just came right on over. He was over that day and we talked. I've talked to the train crews a number of times.
Q. (By Mr. Allen) Did he drive the high-rail up on the Creede branch?
A. He drove it up to the Creede branch. He wasn't about to bring it on to the property.
Q. That would be in violation of the UP?
A. They don't have authority to run up my track. I don't have authority to run up their track. It isn't done.
Q. Have you had discussions with them about authority to run on their track?
A. I've had a number of discussions with

the Union Pacific about a number of topics, including authority to run, including acquisition of

additional rights-of-way.
Q. What's the status of those discussions?
A. Currently as it stands, they would like to see the suit with Creede resolved. And at that time, they will discuss further with me purchasing the line to Del Norte, possibly to Monte Vista. We want to maintain our connection with the outside world.
Q. Why would you want -- if the Union Pacific is running freight trains up to South Fork and --
A. Well, they're not anymore. When the lumber mill closed in South Fork, that was the only real shipper out of that stretch. They don't have anything in Del Norte to speak of. The only thing they brought over this year was been some tank carloads of dust suppressant, probably magnesium chloride, and they brought those over and dispersed those on the county roads and highways, whatever.
Q. Who's the shipper on that?
A. I don't know who the consignee is on that. I'm assuming it's the County.
Q. Possibly the State?

A. Possibly the State, but typically it's done on county roads.

Q. On gravel roads?
A. Right. That's been the only movement on the line.
Q. You must drive Wolf Creek Pass all the time.
A. All the time.
Q. Does CDOT use mag chlor on Wolf Creek Pass?
A. I don't think they do. Wolf Creek is a disaster. They're right in the real immediate construction area. But they water it. It's not that huge of an area. And they're just constantly working on it, so it would really be a moot point. You drive through, then they close it. They dynamite, they load, they get the stuff out, they let you back through. They close it. It's a cycle. They close it 12 hours during the night Monday through Thursday.
Every time I've come through there, I've been held for not less than 45 minutes. I came over for the auction at the lumber mill, and that was on a Tuesday, about a month ago, and I was held there for an hour and a half. Then they announced

that they had overdynamited and the road was now closed all night -- and this was at 4:30 in the

afternoon -- which meant I had to drive all the way around Chama and Antonito and Alamosa, through the Valley, to get there. So what should have been a 99-mile drive was 299-mile drive.
Q. But there's a major construction project going on there?
A. Right.
Q. What are they doing?
A. Widening Wolf Creek. They're taking an area called The Narrows, and they're supposedly going to put a tunnel through there, which will be two lanes one direction and the two existing lanes will be two lanes the other direction.
Q. Is that the largest construction project in the area?
A. I'd say it is.
Q. Where are they -- I assume it has requirements for aggregate and for cement and for asphalt and all that sort of thing; is that a fair assumption?
A. That's probably a fair assumption.
Q. And I take it all of that material is being trucked to the site; is that right?

A. The only thing that's been trucked to the site to date has been equipment that was brought

in long ago, which stays there; and they're just hauling the rock that they're pulling off the hillsides, stockpiling it just a few miles down below the project. The only thing that would be coming in and out would be probably a fuel truck because, effectively, all the equipment stays there.

Q. At some point, is it not logical to assume that there will be shipment in of aggregate and asphalt and rebar?

A. They're creating all their own aggregate. As far as rebar, sure they'll have to bring that in at some point in time, but right now they create their own --

Q. Do you know of any plans to ship anything to this project by rail?

A. No, I don't. And if it was, it would be handled by the Union Pacific.

Q. What can you tell me about contemplated future construction projects in the Creede area? What do you know of that is going to be built or likely to be built over the next five years in and around the Town of Creede?

A. As far as developments, or as far as highway construction?

Q. Anything that is construction.

A. Well, as far as residential construction, I know there will be additional summer homes or some year-round homes built within the county. Not a whole lot within the Town of Creede because Creede doesn't have a whole lot of area to build within.

A large RV park. Roland Zimmerman has got a 500-unit RV park that's under construction. That can expand to a thousand units.

It can't expand (directed to Ms. Myers)? Okay. I understood he had ground that was adequate, if he wanted to put another 500 in. Whether or not that will happen, I don't know.

Q. Do you know Mr. Zimmerman?

A. We've spoken.

Q. Have you spoken with him about becoming a shipper on the Creede branch?

A. There really isn't much to ship to the man. We're talking about an RV park.

Q. So it's mostly horizontal construction?

A. Yeah.

Q. Rearranging earth?

A. Rearranging earth and placing utilities.

Q. Is there any point at which it's

contemplated that there would actually be vertical construction, houses or --

A. Not that I know of in there.

Q. Some sort of modular thing?

A. Not that I know of, but we haven't gone that far into the dialogue.

Q. But there's constant construction activity from one year to the next of second homes, summer homes, that sort of thing in the Creede area; that's fair to say, is it not?

A. Within the Creede area, yes.

Q. And that's been going on for literally decades; isn't that correct?

A. It has been increasing over the last ten years.

Q. Baby boomers retire, they have money with which to go build places, they come to attractive to places such as Creede or Durango, all over the mountain west, rather than Los Angeles or Houston or Dallas to do that?

A. It's the whole gamut as far as age. Demographic-wise, we can't say it's just baby boomers. I've seen a broad range of ages coming in and out.

Q. And for the past 20-plus years, all of

the transportation requirements in the Creede area associated with that construction have been served by truck; is that fair to say?

A. Yes, since 1985.

Q. 1985 is the last --

A. The last train ran to Wasson in 1985.

Q. And those trains operated to haul ore out of the mine, correct?

A. Correct.

Q. Do you know of any plans to reestablish mining in the Creede area?

A. There's always talk about the potential of a mine reopening, but it would have to be cost effective. And I don't believe at this point in time it is cost effective. But if the price of silver were to increase, because it's predominantly a silver mining area, there could be reactivation of mines, which would lead to potential freight.

Q. Where would one find copies of the documentation that went back and forth between you and the Kimbrells?

A. In my office.

Q. Did you bring any documents with you today?

A. I never got near my office. I only

found out about this deposition at 9:30 in the morning yesterday. Then I drove straight here. I couldn't drive to Durango to try to get anything because if I had, I wouldn't have made it over Wolf Creek Pass last night, which would have put me hours longer. As it was, it was right at 2 o'clock in the morning when I got in.

Q. Are you familiar with what was created by the Foundation or by you or by anyone in communicating with the Kimbrells about this project? I assume you are.

A. I am.

Q. Did you, in fact, author that yourself?

A. The agreement?

Q. Yes.

A. It was drafted between all of us. I made a draft. They made a draft. We merged the drafts. There would be a rewrite and another rewrite. It was rewritten a number of times.

Q. And you still have copies of all that material?

A. Most of it.

Q. In what form do they exist? Hard copy?

A. Yes.

Q. Are they also in any computer format?

Could they be e-mailed, for example?

A. I don't know if that could be -- possibly. I can make you hard copies of it, possibly.

Q. What, if anything, was communicated to the Kimbrells with regard to reestablishment of mining activity as a prospective source of shipper revenue on the Creede branch?

A. Well, there was always that potential, but the potential of that happening is very remote as far as the real heavy mining operation that Creede historically saw up until the '80s. At this time, I don't think the likelihood of that happening is very good, but that potential always exists. And as far as what was conveyed to them, it was conveyed that this was historically one of the main factors for that railroad being built. And it was one of the guiding forces and the shaping entities for the Town of Creede, was the railroad.

Q. Are you familiar with Professor -- the late Professor Atheran's history of the Denver & Rio Grande Railroad?

A. Reverend Atheran.

Q. You are?

A. Yes.

Q. Do you agree with his historical account of how the Creede branch was built?

A. I'm aware of a couple of different accounts of how the Creede branch was built.

Q. Correct me if I'm wrong, but I believe his writing is to the effect that David Moffat built the branch at Moffat's expense. And I assume that would have been Moffat and some corporation --

A. I can give you a brief history of the synopsis.

Denver & Rio Grande built the line to Wagon Wheel Gap in 1883. Wagon Wheel Gap was established as the railhead by General Palmer. General Palmer loved the area and built what is now the 4UR Guest Ranch. Before that it was his private domain, and he brought his wealthy financiers, the mining moguls of the era, and his close family and friends, he brought them to that area by private car.

There was a track that ran around the depot there at Wagon Wheel Gap where they used to set out the private cars. There's pictures in the old books of the beautiful old barns sitting there.

That was as far as the line was built.

Now, David Moffat co-owned the Holy

Moses Mine. And this is one of the biggest mines in Creede.

Certainly, if I'm wrong in any of this, I'm certain that the mayor can correct me on this. But the ore was being wagoned down the Wasson toll road to the railhead at Wagon Wheel Gap, which was not cost effective. Apparently the Wassons were charging an exorbitant amount to use the toll road. And David Moffat, who was then president of the Denver & Rio Grande, went to the Board and requested them to extend the railhead from Wagon Wheel Gap to Creede. They declined. He continued on his pursuit of the Board for a number of years, trying to get them to extend the railhead. They would not do so.

They were in the process of standard-gauging the main line. David Moffat then resigned as president of the Rio Grande and formed a company called the Rio Grande Gunnison Railway. That company is what built the line from Wagon Wheel Gap to Creede. It paid for itself in four months, and the Denver & Rio Grande recognized the value of the line. They leased it and ultimately bought it, and then it became part of the D&RGW.

That's how the line got built.

Q. Was the right-of-way acquisition for

that line primarily made under the General Railway Act of 1875?
A. For the Rio Grande Gunnison acquisition?
Q. Yes.
A. The majority of that line is held in fee.
Q. Really?
A. Yes.
Q. So your foundation now owns that right-of-way in fee?
A. The majority of it is held in fee; and, yes, the Foundation owns that fee.
Q. Do you have -- when you obtained what you obtained from the Union Pacific, what documentation did you get?
A. We got a deed from the railroad. We got the legal description, which effectively identifies the right-of-way by quarter quarter, quarter section, quarter section.
Q. Did you get their plats or their documentation, their historic holding, of the right-of-way?

A. I actually received plat maps, which are called valuation maps, from the D&RGW back in

1987 or '88, when I was negotiating with the D&RGW at that time to purchase the Creede branch.
Q. Do you still have those?
A. I do.
Q. Are they of a size that they would be hard to copy?
A. They can be copied, but they're big. There's six or eight of them.
Q. So it would be like --
A. If you want a copy of every one, it's about $55, I think it is, to copy the set.
Q. Do you know as we sit here, on a section-by-section basis, which sections or quarter sections, quarter quarters, are held in fee and which are not up near Creede or Wasson?
A. Really, I don't know specifically below the Town of Creede, what quarter quarter or section number. Obviously, we have a controversial area there in Creede, which is Section 36 and also Section 25.
Q. 36 is actually fairly easy. That's school land?
A. That's school land owned by the State

of Colorado.
Q. I realize the dispute with the State

and the Town and your foundation regarding whether there is or is not an --
MR. ALLEN: Let me go first, if you will, and then I want to hear your comment.
MR. MICKLEWRIGHT: Well, let me object to the form of the question. If you want to lay some --
MR. ALLEN: I'm trying to lay some foundation.
Q. (By Mr. Allen) I recognize that there is a dispute or a controversy or something other than total clarity with regard to the status of rights as to Section 36, where the points on which I think everybody would agree are: A, it's owned by the State of Colorado, it's school land; B, there certainly was at one time a lease to that to the D&RG. And there is -- there are, I guess, conflicts as to whether or not, from the State's point of view, that lease has or has not expired. And the Surface Transportation Board's stated position on that is that it doesn't matter if that's expired; that may be some source of some private rights back and forth, but for purposes of rail operation, the

STB's position is that the holder of the rights to operate rail service has rights to operate over that

section regardless of whether the lease has expired.
Does that fairly summarize the situation with regard to Section 36?
A. Well, to go back to your discussion, your analogy of this, Denver & Rio Grande Historical Foundation purchased the right-of-way in a contiguous form. They purchased it from milepost 299.3 to the end of track in Creede, which is at milepost -- this is also in conflict, but we're going to get this resolved very quickly -- milepost 321. It's all-inclusive.
Q. Where is milepost 321?
A. Windy Gulch, which is above, slightly above, the Town of Creede.
MS. MYERS: Yeah.
THE DEPONENT: Just slightly above the town.
A portion of that right-of-way does go through Section 36 and Section 25. Section 36 is, as you stated, held in fee by the Colorado State Land Board for the use or benefit of the Colorado State School Board, with key verbiage here: Subject to railroad right-of-way.

This has been a controversial issue, but the facts are clear that the right-of-way has

never been abandoned, and it is a viable portion of ground to the benefit of the railroad. We've been through this discussion.

We were in a meeting in Denver February 22nd of last year, which was attended by Merle Knous and Chuck Barnes, mayor of Creede. Both those gentlemen sit on city council, and Chuck was the mayor. And it was made very clear to everyone what existed, what had happened over time, the fact that there had been an agreement dated from 1892, which was superseded by an agreement dated in 1969. Some of the terminology in there was up for debate.

Q. (By Mr. Allen) Now --

MR. MICKLEWRIGHT: I'm not sure he's done answering your question.

MR. ALLEN: I appreciate it, but it's my deposition, and I want to move on to something else.

Q. (By Mr. Allen) I think we've got the main contours outlined, which is the State owns that land. You've got a right-of-way across it?

A. Correct.

Q. Now, Section 25, with regard to Section

25, does the Foundation -- the Foundation is the holder of the rights under the offer of financial

assistance; is that correct?

A. That's correct.

Q. Does the Foundation own anything in Section 25 in fee?

A. No.

Q. Was Section 25 originally acquired, whether by Moffat or by whomever, in fee, or was it acquired by the sort of file-and-use format of the General Railway Act of 1875?

A. Through the General Railway Act. It was a congressional grant.

Q. Okay. And do you have any basis to disagree that if the line is abandoned and not converted to rails-to-trails use, that then the Section 25 land would revert, because it's in a municipality, to the City of Creede under 43 USC, Section 12?

MR. MICKLEWRIGHT: I'm going to object to that as exceeding the scope of the deposition as defined and agreed by the parties and the Court.

You don't have to answer that question unless the judge instructs you otherwise.

MR. ALLEN: Are you instructing him not

to answer?

MR. MICKLEWRIGHT: Yes.

MR. ALLEN: Regardless of the definition of the scope of the deposition, I would very much like to have a clear record on that particular point, which I view to be a really important point in the entire litigation, Ray. And I hate to have to go to the expense of asking to resume this deposition or take another deposition just to get that answer, because I don't think that we have a controversy here.

I think there's going to be agreement on what that answer is, or if you've got another substantive objection, like calls for a legal conclusion, I'd like to have that stated. But I'd really like to have an uncontroverted record on that particular point, before this thing winds up in the STB.

MR. MICKLEWRIGHT: Well, I thought the other day we had a very clear question-and-answer session with the Court, in which you defined very specific areas of information that you wanted. You would agree with me, I think, that this is not one of those areas?

MR. ALLEN: I'm not sure of that

because where I'm going in the very next area of questioning is -- I think I've exhausted shippers,

and where I'm going next is the cost of rehabilitating and reestablishing the line.

MR. MICKLEWRIGHT: How does this fit into the cost of rehabilitating and reestablishing the line?

MR. ALLEN: In this way: In order to rehabilitate and reestablish the line, he's got to get capital raised. I see -- and maybe I'm crazy, but I don't think I am -- a nexus between what you can do to raise capital and what the rights are if there's abandonment.

In other words, does somebody who puts capital into this acquire some kind of rights with regard to the Section 25 land, which is very valuable land because it's got commercial buildings on it, that is always going to be poised on the precipice, if you will, of that being lost and going over to the City of Creede if there's abandonment? It's a risk-related issue for me.

And, therefore, it relates to how you can raise money, and it relates to how you can get the line reestablished.

MR. MICKLEWRIGHT: Well, those are

different questions than you just asked in laying the foundation for the previous question that I

objected to. And I don't have any objection to your asking questions about: Have they calculated in the risk of loss of ownership, for instance, in their fund-raising activities, but I'm not going to allow him to answer questions about whether or not he thinks there has been abandonment of rights-of-way within Section 25.

MR. ALLEN: I understand. The cardinal fact I want to establish here is that if there is an abandonment, then Section 25 reverts, unless there's a rails-to-trails conversion under 43 USC, Section 12 --

MR. MICKLEWRIGHT: I'm going to object to him answering that question because I think, one, it requires speculation; it requires him to draw legal conclusions, and I don't think he's qualified to do that. And I'm not familiar with it and didn't prepare myself for it in order to advise him.

MR. ALLEN: Fair enough.

(A recess was taken.)

Q. (By Mr. Allen) What is it going to cost to get from where you are right now to the first train running up the Creede branch? What's

the cost of rehabilitating that line?

A. The cost to rehabilitate the line

itself is in the vicinity of 700,000. Again, that's to a Class 2 level.

Q. What physical things need to be done?

A. We need -- well, starting at the beginning, we need new ties -- not every tie, obviously -- again, not getting into what qualifies as a good, usable tie versus a tie that has to be replaced. A number of ties have to be replaced. Some rail needs to be replaced.

The rail through the Willow Creek reclamation area, when they built the service roads over it, they broke the rail there. Where they buried it, it's created a lot of rust. We tried to do an evaluation of the road, the railroad, within the Town of Creede. Last summer we put up some posts and ran one line of twine around it to evaluate the perimeter so we could do an evaluation in there. 20 minutes after we left, it was destroyed.

Q. What was destroyed?

A. The posts were all bent over and all crumpled; the twine was all torn up. The people that had done that -- we won't get into that for the

moment, but it was an unfortunate situation. We wanted to identify some boundaries there so people

would know what we were working within, and we wanted to do some work within the ground there to open up that right-of-way, open up that track, so we could see what condition those ties and rail were in.

Q. You've described being at Mount San Antonio College. What did you study there?

A. How in the world did we just get from what the cost will be in rehabbing the line to what did I study at Mount SAC?

Q. I'll tie it up.

A. California business law and premed.

Q. Was there anything in studying the California business law and premed that gave you technical disciplinary qualification to evaluate on an engineering or physical basis rehabilitating rail?

A. Well, it really doesn't require a brain surgeon to get out there and identify what a good tie is versus what a bad tie is, where you've got bank stabilization problems, where you've got areas where you have to shore up your right-of-way, what it's going to take to replace pilings on a bridge.

I've worked for a railroad.

Q. Let me tell you my problem with what

you're saying and ask you to address it. I have walked close to every foot of the Aspen branch of the Rio Grande, between Woody Creek and Wingo Junction, and most of it, but not all of it, from Wingo Junction down to Carbondale. It's about 25 miles of line. And I have read a very comprehensive study of that that was done by Centennial Engineering, which is now MK Centennial, owned by Morrison-Knudsen, that described the cost projection to get that up to a rail line that could be reopened for 15 to 20 -- I can't recall if it was 15 miles an hour traffic or 20 miles an hour.

A. I've seen the figures.

Q. And that was millions of dollars.

A. Right.

Q. Now, that line has been out of service about the same number of years as the line that you're talking about. I think the last freight rail service above Carbondale was about 1982 or '83. And I've litigated all of that.

A. I'm familiar.

Q. So I guess I view myself as competent to read Centennial's report, and as an interested

observer, but certainly not technically competent to evaluate it other than by looking at what I was

walking. I was trying to see evidence of trees growing between the tracks that would have a caliper large enough to say that this tree has been there so long that it makes it unlikely that affidavits that were filed -- and they'd been using it up to 1990, correct, because how would you have a 10-year-old tree growing between the tracks, unless you planted it in?

MR. MICKLEWRIGHT: There's a question here?

MR. ALLEN: There is a question.

Q. (By Mr. Allen) Because I do not consider myself competent to tell a good tie from a bad tie unless the bad tie is falling apart, I'd like to know how you consider yourself competent to make that judgment, rather than hire professionals from a consulting engineering firm or railroad professionals to make that judgment. What experiential background do you have that qualifies you to evaluate rail line from looking at it or digging around it or whatever you do?

A. I've been around railroads and rail lines all my life. This is my father's love, and it

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passed from father to son. I was pushing trains around on the floor before I could walk. So I have

walked railroad track, railroad rights-of-way all my life. I worked for the Katy Railroad in Texas for a number of years.

Q. What did you do for them?

A. Started out as a pin puller and finished up effectively filling in running the Eureka yard in Houston. I was a switchman, a brakeman, a conductor.

Q. During what years were you so employed?

A. It was during the '80s, early '80s. So that would have been -- it may have even been 1980 through '83, '79 through '83, somewhere in that range. I don't remember exactly.

Q. So you've been a railway brakeman?

A. Uh-huh, yes.

Q. Railway conductor?

A. Yes.

Q. Belonged to the rail unions?

A. Yeah, UTU.

Q. Do you still?

A. No.

Q. When did you last have a card in the UTU?

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A. Oh, whenever it was I ceased working for Katy. That would have been probably '83, I'm

guessing. But as far as --

Q. So --

A. Getting back to looking at ties, getting back to what would qualify me to say what is and is not a good tie, first of all, we have the regs from the FRA that includes the verbiage as to what is and what doesn't -- what is and isn't a good tie. There are specs for this. You can say this tie is, or it is cracked to a point where ballasts can come up through it, this or that. But we have all those regs.

At this point, we remain fully compliant with the FRA regs in what we are doing in the rehab process.

Q. Now, has the Foundation or anyone employed by the Foundation or working on behalf of the Foundation engaged anyone outside the Foundation, any person, entity, company, whatever, consultant, to evaluate the cost of reestablishment of rail service on the line?

A. We have not had -- we have not hired a formal firm -- or formally hired a firm to come in and do a detailed evaluation.

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Q. Is there anything in the material you've developed in your communications with the

Kimbrells that speaks to or comments on the cost of reestablishment and rehabilitation of the line?

A. Yes.

Q. And those are materials that are in your office in Durango?

A. That's correct.

MR. ALLEN: And I presume, Ray, that if we send you a request for production and bear the copy costs, we'll get copies of those materials.

MR. MICKLEWRIGHT: I would assume that they would probably be produced in the context of 26(a)(1) disclosures that are due on or about June 25th, if not sooner.

MR. ALLEN: Okay. You have a draft of a scheduling order that I think put that date at June 30. Am I right? Didn't your draft put the disclosure date at June 30, or am I thinking about another case?

MR. MICKLEWRIGHT: I don't recall, but I think I'm right that -- I think at least I'm right that it's June 25th, which is 14 days after --.

MR. ALLEN: The 13th.

MR. MICKLEWRIGHT: -- the 11th.

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MR. ALLEN: Whatever it is, at some point soon, that will be disclosed?

MR. MICKLEWRIGHT: Yes.
MR. ALLEN: But not necessarily produced?
MR. MICKLEWRIGHT: Correct.
Q. (By Mr. Allen) How many bridges are there on the Creede branch?
A. Five.
Q. What is the nature of their construction? Are they all wood?
A. All except one -- well, one is half wood and half steel.
Q. And one of them -- one is half wood and half steel; the others are all wood?
A. Yes.
Q. And am I correct that there's a Colorado historical designation on the bridges, so that their rehabilitation or reconstruction would require their being redone --
A. In a historic manner.
Q. -- in a historic manner, the same visual effect?
A. The Creede branch was deemed for inclusion on the National Register. When you're

deemed eligible, you might as well be in as far as the requirements that are put upon you, that they

need to be rebuilt in a historical manner.
Q. Does that make the cost greater than it otherwise would be?
A. In some respects, it can. In other respects, no.
Q. How much rail needs to be replaced in order for it to be active again?
A. Oh, do you want that in feet?
Q. I really want it in dollar terms.
A. Well, I have -- what do I have? I'm trying to remember how many feet I just ordered. I'm sorry, this is tired coming through at the moment.
I purchased a bunch of rail which we'll take delivery on this summer. I'm trying to remember how many feet we got.
You have to understand -- this is something I want you to be aware of because I knew where you were going with your questions on this -- with respect to the Aspen branch and the cost to rehab that and bring it up to whatever level you were saying, in a perfect world where you go out and buy brand-new everything and you hire a contractor

to come in and install everything, you can certainly spend a great deal of money. But, as a charitable

foundation, we have found it appropriate to negotiate for the best conceivable deal possible, whether that is for first quality relay ties, which, in effect, in layman's terms, are used, which still have significant life left in them -- there are some very good deals to be made in purchasing relay ties, on buying used rail.
When we go out and we buy OTM, which is other track material, tie plates, bolts, fasteners, spikes, whatever the case may be, we'll negotiate for this stuff.
Q. From whom do you make these purchases?
A. It can be anywhere from Pioneer Sand for ties, or it can be from the railyard in Omaha. I've got -- I can buy ties there, quality ties, delivered to South Fork, for 13.95 apiece. But I can buy used ties other places for 5 to $6 apiece.
Q. How many total ties need to be bought in order to reestablish this line?
A. Right now, about 8,000.
Q. At, say, $10 apiece --
A. That's an average.
Q. $80,000?

A. Yes.
Q. What's the labor cost to put them in?

A. It depends on if they're put in by volunteer or if they're put in by a formal employee.
Q. What's the unit of labor required to put a tie in?
A. Well, again, that depends on if it's done in a mechanized manner or if it's done in a nonmechanized manner. We don't intend to do a real big tie replacement program using manual labor. We're going to an auction this summer, at which there is a tamper and tie finger, which is a tie installer/remover. We've already purchased some maintenance-of-way equipment. We purchased that at the Union Pacific auction this year.
Q. What did you buy and what did you pay for it?
A. We bought a rail anchor installer. And a rail anchor is the steel piece that clamps next to the ties on both sides and on the bottom of the rail. We bought it more as an operational hydraulic platform than we did anything else because, from that platform, we can run other tools. We can run spike removers, spike installers, hydraulic in nature. You can run rail saws, rail drills from the

hydraulic platform. This piece of equipment probably sold new -- I'm going to guesstimate -- for

50 to $60,000. We bought it for 90 bucks, 9-0.
Q. And where did you buy it?
A. Denver, the Union Pacific auction.
Q. Where is it now?
A. Durango. We took it down, steamed it, repainted it, checked everything. It fired right up. All the hydraulics work. It's an excellent buy. This stuff is out there. So, in the perfect world, if we have an unlimited budget where we could go out and buy all this equipment --
Q. If you had access to the Pitkin County treasury?
A. Pitkin County, certainly, is a good example of a large treasury. But we don't. But we do some good selective buying, and we do a good job at it.
Q. Is there somewhere that there is a document that establishes the entire global cost of reestablishment of the Creede branch so that you can operate a train over it?
A. Sure. We did that model long ago, but those figures have been skewed time and time again because of the availability of equipment and

materials to us at significantly lower cost.
Q. But where is that model now?

A. Durango, my office.
Q. So you have a document that, I presume, will be identified in your disclosures that will tell us the cost of rehabilitation and reestablishment of this right-of-way so that it can carry train traffic?
A. Yes.
Q. What is that cost in that document?
A. The cost to rehabilitate the line, based on that document, was in the vicinity of $700,000.
Q. But what you're telling me now is that you can -- you hope to achieve a few more successes where you get something that might cost you 80 or $90,000 for essentially nothing other than the cost of transporting it to you, and you can get a lot of things you need that way?
A. Absolutely.
Q. Has there been an engineering inspection by an outside independent professional engineer with competence in rail line evaluation of the Creede branch?
MR. MICKLEWRIGHT: I'm going to object

to that on lack of Foundation.
Q. (By Mr. Allen) Has there at any point

since, let us say, five years ago, that you know of, been an evaluation by an engineer or other person with professional competence, not employed by you, not employed by Union Pacific, not employed by D&RG or Southern Pacific, to evaluate and make a projection of the cost and the things that need to be done to reestablish service on the Creede branch?
A. No, prior to your clarification on that, those types of things had been done by railroad employees or railroad subcontractors.
Q. Does Union Pacific have, that you know of, any documentation or feasibility studies or cost projections or anything else of the costs of reestablishment of service on the Creede branch?
A. I believe there was a report that was done -- I'm not sure if that was actually done by the UP or D&RGW, but there was a report done years ago.
Q. How long ago?
A. I don't know, but I know I've had the report referenced to me.
Q. To the best of your knowledge, why was the Union Pacific prepared in 1999 to abandon the

Creede branch?
A. The Union Pacific itself has never

operated a train on the branch. They operated as far as Derrick, which is the "Y" just beyond South Fork where they turned their locomotives around for the freight service that they were handling on the Valley line to South Fork. Union Pacific had no need for the line, so they placed it on their hit list.
Q. They own and operate the largest railroad in the United States, right?
A. That's correct.
Q. They have been involved in the operation of railroad activity in the western United States since they were formed in 1862, right?
A. Were they formed in '62?
Q. Union Pacific Act was passed by the Congress in 1862. I don't know if they were formed prior to or immediately following, but certainly in that time period, the Union Pacific was established.
A. When the Transcontinental Railroad came in, that was May 10th, 1969. So that's when the real presence became known.
Q. In any event, they can be presumed, can they not, to know what they're doing?

MR. MICKLEWRIGHT: I'll object to the form of the question.

I don't think -- if you can assume what somebody else might have been thinking about at some previous point in time, and that entity being not a person but a corporation, be my guest.

THE DEPONENT: You want me to answer that?

Q. (By Mr. Allen) No, I'll withdraw it.

If there were the prospect of a substantial profitable business for the carriage of freight over the Creede branch, couldn't we fairly assume the Union Pacific would not have sought to abandon it?

MR. MICKLEWRIGHT: I'm going to object to that because you're assuming the only reason they would use it is because it would be profitable and the only reason they would abandon it is because it's unprofitable. Without more knowledge of his knowledge of the Union Pacific's business model --

MR. ALLEN: That's fine. It's not important to me.

Q. (By Mr. Allen) If you were going to engage an outside consulting firm or professional firm to evaluate the cost of rehabilitating and

reopening the Creede branch, who would you consider to be qualified potential persons or entities to do

that task?

A. There's a number of railroad contractors out there. My most critical inspection would be Martin & Martin Engineering firm coming in for the bridges. Bridges are vitally important. And at some point in time, I will contact them.

Q. Where are they?

A. I'm assuming they're in Colorado. Durango & Silverton has used them for years. They do all the bridges down there. I believe they're located in Colorado. I'm not positive on that.

Q. You don't know?

A. No, I'm not positive. I have not contacted them as yet.

As far as railroad contractors, there are, yes, a number of contractors out there.

Q. I'm not talking about contractors that build things. I'm talking about consulting engineering firms or consulting railroad firms that would have professional competence and expertise comparable to what Centennial Engineering had in doing an evaluation of the rehabilitation of the Aspen branch of the D&RG. Other than Martin &

Martin --

A. Martin & Martin were just for the

bridges.

Q. Whom do you consider competent to do an evaluation and cost projection and so forth of the task involved with the Creede branch?

A. Well, as I stated, there's any number of --

Q. Who?

A. I'm not going to sit here and recite a bunch of names to you. Right now, I can't pull them off the top of my head as to who is and who isn't. We will do the rehabilitation on the railroad ourselves.

Q. But if somebody wanted to go hire someone, for example, to evaluate that --

A. Neosho.

Q. Where are they?

A. I think they're in Denver, but --

Q. Let me put it another way: Let's say I'm a lawyer and I come to you and I say, I have a client which might be interested in investing in this. My client has a lot of money, millions and millions of dollars. My client, in doing a due diligence on whether or not to do that investment,

wants an independent evaluation of the cost of rehabilitation and reestablishment of this line for,

let's say, 15 miles per hour, Class 2 freight rail service, and I don't want to just accept your having done some things yourself, or the Foundation having done some things. We want to get an independent, outside evaluation of that. We're willing to pay for a feasibility study or an evaluation so somebody would inspect it, write us a report, and so forth. Who is recognized by you as competent to do that other than Martin & Martin and Neosho?

A. I can't pull a name off the top of my head.

Q. At any point, have you or has the Foundation or anyone acting on behalf of the Foundation solicited such services or made requests for proposals or otherwise gone to the marketplace, if you will, of consultant services and asked if someone will or can do that?

A. No. Let me clarify that no for you. You've got to realize that, in the grand scheme of things, in the bigger picture as to what we're doing here, what we're trying to accomplish, we've been fought every step of the way. Getting from Point A to Point B should be a simple operation, but,

unfortunately, when you have practically every regulatory agency being contacted by certain members

of the City of Creede, whether it's the PUC or the Corps of Engineers or the Forest Service or so on and so forth -- and each and every one of these complaints that are filed take a detailed report or a detailed response from me to them; then it takes a site visitation; it takes the follow-up work on this. And each and every one of those times, it is found that we have done nothing wrong, but it wastes time, wastes energy. These lawsuits, the agreement that there would be no fund-raising, the demise of investors or potential investors -- every one of these are things that certain members of Creede hope to accomplish, hope to slow us down and cost us money.

So, in the perfect world, we could say we've purchased this, let's hire this consulting firm, this engineering firm, let's do this and this, let's bring them in and do the evaluation. We have a pretty good idea what needs to be done out there. We will implement that program, and we will perform those duties, mostly by ourselves. But it's all going to be subject to FRA, Federal Railroad Administration, inspection and ultimately

certification.

Q. Has there been any FRA inspection of

any part of the Creede branch since the Foundation purchased it?

A. Not yet. We have had a number of discussions with them.

Q. Okay. You've said about $700,000 to rehabilitate the line, right?

A. Yes.

Q. And once you've spent that $700,000, will the line then be in shape that you can take a locomotive and some freight cars up the line all the way to Creede?

A. We hope so. We don't know. There's variables in there.

Q. What other costs are out there that have to be met before you can do that?

A. Well, clearly, there's a number of things that have to be done.

Q. You still have to pay the Union Pacific some money?

A. Yes.

Q. How much money do you have to pay the Union Pacific?

MR. MICKLEWRIGHT: Slow this down.

Let's give her some space.

Q. (By Mr. Allen) How much is owed to the

Union Pacific?

A. The current balance on the note is 274,616.

Q. When was that initially due?

A. Initially it was due -- we closed on the purchase May 24th of 2000. And I believe the first payment was due later that year, later last year. And with the situation as it currently exists with the City of Creede, the legal issues, the difficulty, the road blocks that have been placed before us, the problems created by all of these things, Union Pacific has become sympathetic to our plight and has extended the note out and will re-extend the note out as we need it.

Q. Is there a present due date for that payment?

A. The first payment -- it's not that entire payment. Half of that is due September 2nd, and the second half is due March 2nd of 2002.

Q. Has Union Pacific provided any other consideration to assist you with rehabilitating and resuming service other than deferring installments on the note?

A. At the present time, we haven't asked them for anything else, but there has been

suggestion of some other potential assistance, which I am not really going to elaborate on at this moment.

Q. With whom are those discussions being held?

A. A number of Union Pacific employees.

Q. Who are they? Please name names.

MR. MICKLEWRIGHT: To the extent that that's not a proprietary issue --

THE DEPONENT: Well, at this time, it is a bit proprietary. There are other discussions and negotiations going on currently between the Foundation --

Q. (By Mr. Allen) Have you or the Foundation signed a confidentiality agreement with the Union Pacific?

A. As to the terms of the purchase?

Q. No, with regard to these other negotiations that you say are going on.

A. No.

Q. Has there been an oral undertaking by the Union Pacific in which it has either sought or offered confidentiality with regard to these

discussions?

A. No.

Q. Do you have any reason to believe that there's anything about these discussions that involves confidentiality, proprietary information, or trade secrets of the Union Pacific?
A. No.
Q. Do you assert that there's any proprietary information or there are any trade secrets with regard to your participation in these discussions with the Union Pacific?
A. With respect to our side?
Q. Right.
A. Potentially.
Q. What is -- what are the contours of your assertion of confidentiality or invasion of proprietary information or trade secrets pertaining to these discussions you say you're having with the Union Pacific?
A. I'm sorry, can you rephrase that?
Q. What are the contours, what are the boundaries, how would you describe what is proprietary or what is confidential, and what are the reasons why you cannot disclose it?
A. If it deals with the future business

plan on behalf of the Foundation or the railroad or something that we may or may not entertain or may or

may not look at doing, I don't feel this is an appropriate time to air those views, especially in front of B.J., who never hesitates to throw it in the newspaper.
Q. Have you at any point read the decision of the Surface Transportation Board rejecting the offer of financial assistance in the Roaring Fork case?
A. I've read some of it.
Q. In that decision, the Board rejected the offer of financial assistance by a Salt Lake City group which sought OFA rights on the Aspen branch of the Union Pacific because it found that their application did not show adequate shipper demand to meet the ongoing operating costs of providing interstate freight service over that branch. Because of that fact, I perceive that the Surface Transportation Board is concerned with prospective shipper-driven demand and revenue stream with regard to operation of a railroad under an offer of financial assistance.
What I'm trying to elicit from you is information with regard to two things: What the

cost will be of providing the service and what the income will be to pay that cost? Okay?

A. Yes.
Q. We've talked about shippers?
A. Yes.
Q. Now I want to find out about cost. And to the extent that you've been having discussions with the Union Pacific that you say do not implicate trade secrets or confidential or proprietary information on the part of the Union Pacific, I fail to see any reason why that implicates trade secrets or proprietary information or confidential information with respect to your Foundation. Therefore, I want to inquire into it.
MR. ALLEN: Now, Ray, in order to inquire into it -- and I recognize the sensitivity of Mayor Myers' position. She's a public officeholder; she has a fiduciary duty to her constituents and to the City of Creede.
THE DEPONENT: Is that to all her constituents?
MR. ALLEN: No, it's to her constituents taken as a body corporate.
Here's what I propose so that I don't put her in a bind: I propose a confidentiality

undertaking in which she will absent herself from the room so that she doesn't have to hear it. We

shall, when this is transcribed, excerpt it and bracket it or seal it or whatever we need to do so that it doesn't become a public record, but I want to find out so that it can be used with Judge Shaffer, Judge Babcock, and the STB, if it goes there under suitable protections, what it is that has been going on in these plans, or whatever, because I think it's absolutely germane to the merits of this case as to what is going to be the cost of rehabilitating this thing and the cost of operating it.
And I realize that maybe he's got business plans that involve competitors, involves whatever, that it's sensitive. I recognize the potential sensitivity. I want to find a means of developing the record. I'm willing to kick my client out of the room. I'm willing myself, as an officer of the court, to be bound by the confidential undertaking.
If I say it's not going to go beyond the judges, their clerks, their staff -- and I'm sure Jana will protect its confidentiality -- Ray, that ought to be good enough. I want to get a

response to the question. I don't want to put my client in the position where she feels she may have

some public duty to disclose. Fine, we'll keep her from knowing it so she doesn't have a problem, she doesn't have to go tell the other members of the Board of Trustees, because she doesn't know.

MR. MICKLEWRIGHT: Why don't you give us about two minutes.

(A recess was taken.)

MR. MICKLEWRIGHT: I'm going to assert that this information is confidential. And while it may not fall within the strict definition of a trade secret, as that word might be defined in the, at one time, proposed Rule 508 of the Federal Rules of Evidence, I certainly think that the disclosure of this information would have the effect of adversely affecting the relationship, under the current circumstances, between the Foundation and the Union Pacific that would ultimately be adverse to our business plan and our proposed course of conduct with respect to rehabilitation of the rail line.

Now, having said that, I think one of the obligations that I'm required -- one of the obligations I have is that, with respect to Federal Rule of Civil Procedure 26(A)(1), I probably have a

requirement to disclose who those folks are and allow the judge to allow you to argue that issue of

whether or not I have to provide further disclosures than certainly their existence.

MR. ALLEN: Right, who are they? Who are they?

MR. MICKLEWRIGHT: So the answer to that is I'm not going to disclose that unless I'm ordered by the Court to disclose specific names.

MR. ALLEN: So you're not going to tell us who it is with whom Mr. Shank or the Foundation have been dealing at the Union Pacific?

MR. MICKLEWRIGHT: I think, given the scope of the deposition, the question, I think, that is fair to ask him is: Has he had conversations, and what are they? I think we have asserted the position that it's confidential as to who those discussions have been held with, until we're ordered by the Court to provide that information, because we think it adversely affects our business plan.

Q. (By Mr. Allen) Is there a business plan as a single document that one can pick up and say: Here is the business plan of either the Foundation or of the C corp that you own?

A. There have been several models with

respect to rehab costs, operational cost, et cetera, et cetera, which have been rewritten and rewritten.

There's so many different drafts of that. But to put it all together into one form, a business plan -- it's part and parcel. It's not all one single entity. So, no.

Q. So there's no single spiral-bound thing with plastic --

A. And a lot of fold-out, telescoping pages. Not yet.

Q. Have you sought the advice or participation of an investment banking firm in bringing your dream of operating the Creede branch to reality?

A. No.

Q. Have you sought a credit facility of any kind, bank loan, loan from any other institution?

A. No. I've had some preliminary dialogue, but not beyond that point.

Q. With whom has that dialogue been held?

A. I talked to a couple of local banks in Durango, and I talked to -- I talked to an investment banking firm that has dealt with railroads and this type of venture, but they

demanded such a ridiculous initial fee that I just promptly ruled them out.

Q. What firm was that?

A. I don't remember the name. It's been some time, and it didn't get beyond the initial contact stage.

Q. How long ago was it?

MR. MICKLEWRIGHT: Your client is back up here, if she wants to come in.

Q. (By Mr. Allen) How long ago was that?

A. Last year sometime.

Q. So you talked to an investment banking firm that presented you with -- for want of a better term, I will call it a boxcar number that it wanted to get involved on your behalf and -- is that fair to say?

A. Yeah, it was packed with front-end fees, and I said no.

Q. But you can't remember who it was?

A. I don't remember the name.

Q. How many investment banking firms do you know?

A. I was in the mortgage banking business for a lot of years.

Q. So you know everybody?

A. Well, I read The Scotsman from time to time, and there's certainly a few names in there.

We've dealt with a lot of people.
Q. Have you dealt with any of the Colorado investment banking firms or sought to involve any of the Colorado investment banking firms in this project?
A. No.
Q. Is there any reason why not?
A. We simply weren't at that point.
Q. What do you view as being the timetable for getting provision of common carrier interstate freight rail shipment going over the Creede branch?
A. Our timetable for that?
Q. Right.
A. Originally we had hoped to be operational by Memorial Day of 2002. I see that down the road now.
Q. Do you think it is, for all practical purposes, barring a miracle, impossible for you to get interstate common carriage of freight by rail going over the Creede branch by Memorial Day 2002?
A. I don't see it happening. I'm not going to say it's impossible, but I don't see it happening.

Q. To what extent do you need to have a tourist train operating over this in order to

provide a revenue stream that would then, in effect, subsidize carriage of interstate freight rail traffic?
A. We're clearly looking at a tourist train on this line.
Q. It's fair to say -- directing one's attention to Exhibit 1, which is the material from the website -- this has no mention whatever as to anything with regard to carriage of interstate freight rail traffic over the Creede branch; isn't that right?
A. We're appealing to the masses on this. Clearly, you have a better chance at bringing in tourists for ridership as opposed to shippers for freight business. We'll work on both.
Q. But you have several functioning, viable operations carrying tourists in the area, right, Cumberland Tolltech and Durango & Silverton?
MR. MICKLEWRIGHT: Objection, argumentative.
MR. ALLEN: I'm trying to establish a Foundation.
THE DEPONENT: Silverton is 100 miles

away. Antonito is practically the same.
Q. (By Mr. Allen) Do they not establish

that there is a basic market demand within the western United States for tourist trains based on a nostalgic view of the past of the West, if you will?
MR. MICKLEWRIGHT: I'll object to that as an ambiguous question. What's the question? Are there too many tourist trains?
MR. ALLEN: I want to get an admission here that, yes, the tourist train is something that potentially could be made to work.
MR. MICKLEWRIGHT: I thought he answered that question.
Q. (By Mr. Allen) Do you agree with me?
A. Yes, a tourist train is something that potentially can work.
Q. That can potentially yield revenue, right?
A. Correct.
Q. Without a tourist train, is it fair to say that it is doubtful that a freight rail service can be made to work from a financial point of view on the Creede branch?
A. I'm not going to say that one or the

other can't stand alone. We don't know. We're not operational. We're struggling to get to that

point. We'd be a lot further along if it weren't for this constant road block being thrown in our face, but we can move on.
Q. It is fair to say, is it not, that you cannot put anything on this table that separates us right now, whether it's proprietary, trade secret, or otherwise, that gives us any concrete evidence or numbers of a quantitative nature on which we can rely to determine whether or not freight rail service can be established on the Creede branch? Isn't that fair to say?
MR. MICKLEWRIGHT: I'm going to object to that because it lacks foundation. Is there a requirement that he do that?
MR. ALLEN: That's certainly how I read Roaring Fork in Lancaster County, is that there must be a shipper-driven definition of a revenue stream sufficient to meet the operating cost. Those cases don't even address the cost of creating a rail. They deal with operating rail lines where somebody was talking about either reestablishing or continuing freight rail service. But it seems to me it's pretty clear that they say that you have to

have a shipper-driven revenue stream that's sufficient to pay the costs of operating a line. In

Roaring Fork, they denied an offer of financial assistance.

MR. MICKLEWRIGHT: There's a question there. I just want you to get to it. It sounds to me like: Do you expect to have a shipper-driven revenue stream?

MR. ALLEN: I think we've already established he doesn't know.

THE DEPONENT: We're not at that point yet.

MR. ALLEN: He doesn't know if he is going to have a shipper-driven revenue stream.

Q. (By Mr. Allen) You also don't know what the cost will be of establishing the right-of-way and getting operational; isn't that fair to say?

A. We have some numbers that we've gone by on that.

Q. That's the $700,000 number, right?

A. That's correct.

Q. Plus paying the Union Pacific another quarter of a million. So roughly a million dollars gets your debt paid off and gets your line

rehabilitated; am I correct?

A. Approximately.

Q. Then do you have any cost projections for the operating cost of providing freight rail service?

A. We do.

Q. What are those numbers?

A. I don't have them with me.

Q. What are they approximately?

A. I'm not sure. I can't just pull numbers out of thin air.

Q. What do you need to buy? You need to buy a locomotive?

A. We have one donated to us.

Q. Where is it now?

A. Brighton.

Q. Describe it, if you would.

A. It's a GE center cab, 44 ton, diesel locomotive.

Q. Where is it right now?

A. In Brighton.

Q. In whose custody? In Brighton, Colorado?

A. Amalgamated Sugar.

Q. Is that piece of rolling stock in your

foundation or in an entity controlled by your foundation?

A. It will be. They have agreed to donate it.

Q. Is there a written documentation of the agreement to donate it?

A. Yes.

Q. Where is that documentation?

A. In Durango.

Q. What vintage locomotive is that?

A. 1942.

Q. Is it operational right now?

A. No.

Q. What will it cost to make it operational?

A. We're in an assessment stage on that right now. The gentleman that just donated some maintenance-of-way equipment to us has a brother that works for Caterpillar. The locomotive has two Caterpillar diesel engines. He's going to get involved and see what he can do.

I have another good friend who has family members who work at Caterpillar, at corporate. He's going to see what he can do. Again, we're a charitable foundation.

Q. So there's a 59-year-old GE diesel sitting somewhere -- is it on rails right now?

A. Yes.

Q. When was the last time it operated?

A. I'm not sure what year.

Q. What other rolling stock do you have for carriage of freight?

A. For actual carriage of freight, right now, we don't have any. I've got narrow gage freight cars, but we're not narrow gage at this time.

Again, Fred Jones from Rock and Rail is working to line us up some freight cars through Progress Rail. Progress Rail holds the contract to scrap freight cars for Union Pacific. Union Pacific is retiring gobs of railroad cars.

Q. All the time, right?

A. All the time.

Q. What kind of freight cars do you need?

A. We'll have a variety, boxcars, gondolas, hobber cars.

Q. What would you use hobber cars for other than your own ballasting operation?

A. Ballasting operation, possible aggregate business. We're going to acquire cars on

an as-needed basis.

Q. What does it cost to acquire a good

used hopper car?
A. Union Pacific is liquidating cars as low as $25 apiece.
Q. How many people are you going to need to employ in order to carry freight over this line?
A. Including section men, maintenance-of-way? You've got an overlap there between passenger and freight --
Q. For freight.
A. Just strictly for freight itself?
Q. Right.
A. How many people?
Q. Yes.
A. If I can think back to the model. 36.
Q. At what average annual compensation?
A. It varies because one of the things that we're going to try to do is to retrain and utilize people that have been laid off from the lumber mill in South Fork. That put 110 people out of work.
Q. That was the last shipper in the neighborhood, right?
A. That was the last shipper in the

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neighborhood.
Q. And it's no longer operational, right?

A. That's correct.
THE DEPONENT: Gee, it's noon.
MR. MICKLEWRIGHT: How much more do you have?
Q. (By Mr. Allen) How much do you think you'll have to pay each person per month?
MR. MICKLEWRIGHT: You can answer this last question.
THE DEPONENT: How much are we going to pay them per month?
Q. (By Mr. Allen) Right.
A. What position?
Q. Average, the whole 36.
MR. MICKLEWRIGHT: If you can, answer it.
THE DEPONENT: Let's see. If we average it -- it's a range for salaries because a brakeman doesn't make what a conductor makes, a fireman doesn't make what an engineman makes. It all varies. Let's say $8 an hour.
Q. (By Mr. Allen) Will [redacted] full-time people?
MR. MICKLEWRIGHT: That's the end.

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MR. ALLEN: Ray, we took breaks. I was given three hours.

MR. MICKLEWRIGHT: I understand that. If you want to get the judge on the line and let him know that I didn't give you enough time, let's hash it out. I think I was more than fair by waiting 15 minutes for you to show up. That's your time, not my time. I made it clear yesterday.
MR. ALLEN: I would prefer that you would agree that we may have another 15 minutes. I am not going to trouble the federal judge over it.
MR. MICKLEWRIGHT: Absolutely not.
THE DEPONENT: I was here 30 minutes early.
MR. ALLEN: I appreciate that.
THE DEPONENT: I got three hours of sleep and drove almost 16 hours yesterday.
MR. ALLEN: It's obvious we'll have to take another deposition or resume this deposition at some point anyhow. I think I'd prefer to go a bit longer; but if you won't agree to it, I'm certainly not going to bother Judge Shaffer or Judge Babcock over 15 minutes.
MR. MICKLEWRIGHT: Let me make this thing come back on and I'll make sure we're clear on

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what documents I've agreed to provide you.
MR. ALLEN: Part of the reason I'd like

that is I'd like to ask one question as to what plans, if any, there are with regard to the marketing agreement in the Hargraves' affidavit. We'll do a lot of that question and answer.
MR. MICKLEWRIGHT: No. These are the items that I think you've requested and that we've agreed to expedite the production on. You've asked for documents evidencing -- is it Kimbrell?
THE DEPONENT: Kimbrell.
MR. MICKLEWRIGHT: -- the Kimbrell transaction, including specific information of the cost of rehabilitation of the rail line and those incidental issues that are in that sort of compartmentalized business plan; projection of the cost of rehabilitating the line, the documents that sort of substantiate the $700,000 cost; and to the extent that there are other documents in that neighborhood, we'll try to make those available as quickly as we can.
MR. MICKLEWRIGHT: You have an opportunity to read and review --
MR. ALLEN: Hold on. Let me make you an offer.

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Right now, the record of this proceeding is unrebutted that there are no plans to

do anything with the area of the marketing agreement in the Hargraves' affidavit. You have an opportunity to describe any plans, if you want to take it. If you want to leave the record as it is, I'm happy with that record.

MR. MICKLEWRIGHT: Okay. Then I'm happy to leave it the way it is.

MR. ALLEN: You have a chance right now to offer a description of the plans, subject to cross-examination, in a way in which you would have a good record on that in any subsequent proceeding.

MR. MICKLEWRIGHT: Why wouldn't we be able to do it by affidavit?

MR. ALLEN: Because that's not subject to cross-examination; it may not be admissible.

MR. MICKLEWRIGHT: All right, I'll take my risks.

You'll have an opportunity to read and review your deposition, and I will make sure that the deposition comes to me directly. Then I'll provide it to my client. We generally have to do that within 30 days. I think a three-hour deposition, we can probably accommodate that. So if

you will send it to me, I would appreciate it, and I will get it read, reviewed, and finalized. And if

you would also provide me with an ASCII copy or disk copy.

(Whereupon, the deposition was concluded at 12:10 p.m.)

I have read the foregoing transcript of my testimony and have indicated same by my signature.

DONALD H. SHANK

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

Subscribed and sworn to before me by the said DONALD H. SHANK, this day of , 2001.

My commission expires:

Notary Public

Address

Reporter: JM
Trial Date: None

CERTIFICATE

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

I, Jana Mackelprang, a Registered Professional Reporter, Certified Realtime Reporter, and Notary Public for the State of Colorado, do hereby certify that previous to the commencement of the examination, the said DONALD H. SHANK was duly sworn by me to testify the truth in relation to the matters in controversy between the said parties; that the said deposition was taken in shorthand by me and was reduced to typewritten form by computer-aided transcription; that the foregoing is a true transcript of the questions asked, testimony given, and proceedings had; that I am not attorney nor counsel nor in any way connected with any attorney or counsel for any of the parties to said action or otherwise interested in its event.

IN WITNESS WHEREOF, I have hereunto affixed my hand and notarial seal this 28th day of June, 2001.

My commission expires: January 24, 2004.

JANA MACKELPRANG
Registered Professional Reporter
and Notary Public
CALDERWOOD-MACKELPRANG, INC.

CALDERWOOD-MACKELPRANG, INC.
Diamond Hill
2480 West 26th Avenue, Suite 130-B
Denver, Colorado 80211

June 29, 2001

RAYMOND P. MICKLEWRIGHT, ESQ.
Wolf & Slatkin
44 Cook Street, Suite 1000
Denver, Colorado 80206-5827
Re: City of Creede vs. D&RG Historical Foundation
Deposition of: DONALD H. SHANK

The deposition in the above-entitled matter is ready for reading and signing. Please attend to this matter by complying with ALL blanks checked below:

arranging with us at the number listed below to read and sign the deposition in our office.
XX having deponent read your copy and sign amendment sheets, if any (original signature page enclosed).
reading enclosed deposition, signing attached signature page and correction sheets, if any.

XX within 30 days of the date of this letter.

by _____ due to the trial date of _____.

Please be sure that the signature page and accompanying amendment sheets, if any, are signed before a notary public and returned to our office at the above address.
If this matter has not been taken care of within said period of time, the deposition will be filed unsigned pursuant to the Rules of Civil Procedure.
Thank you.
JANA MACKELPRANG, RPR, CSR, CRR
CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
c: Counsel of Record

CALDERWOOD-MACKELPRANG, INC.
Diamond Hill
2480 West 26th Avenue, Suite 130-B
Denver, Colorado 80211

GEORGE M. ALLEN, ESQ.
206-A Society Drive
Telluride, Colorado 81435

Re: City of Creede vs. D&RG Historical Foundation

Dear Mr. Allen:

Enclosed is the deposition of: DONALD H. SHANK

Previously filed. Forwarding signature page and amendment sheets.
Signed, no changes.
Signed, with changes, copy of which is enclosed.

Unsigned, notice duly given _____, pursuant to the Rules of Civil Procedure.
Not signed, notice duly given _____, since trial is set for _____.

No signature required.

Signature waived.

To be signed in court.

Signature pages/amendments to be returned to court on date of trial.
Mailed by certified mail # _____.
Hand-delivered on approximately _____.
JANA MACKELPRANG, RPR, CSR, CRR
CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
c: Counsel of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 01-B-0318

CITY OF CREEDE, a Colorado Municipal Corporation,

Plaintiff,

vs.

DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION, a Colorado Not-For-Profit Corporation and DONALD H. SHANK,

Defendants.

DEPOSITION OF DONALD H. SHANK, VOL. II

BE IT REMEMBERED that on, to wit, the 3rd day of August, 2001, this matter came on for the taking of the deposition of DONALD H. SHANK before Christina DiSanto, a Certified Court Reporter and Notary Public of the firm of ANIMAS REPORTING SERVICE, 919 County Road 142, Durango, Colorado, 81303, taken at the Law Offices of Michael E. McLachlan, Esq., 813 Main Avenue, Suite 308, Durango, Colorado, at the hour of 10:30 in the morning.

A P P E A R A N C E S

FOR THE PLAINTIFF: MR. GEORGE M. ALLEN
Attorney at Law
206-A Society Drive
Telluride, Colorado 81435

FOR THE DEFENDANTS: RAYMOND P. MICKLEWRIGHT
WOLF & SLATKIN
44 Cook Street
Denver, Colorado 80206

ALSO PRESENT: Mr. Joe W. Burkett
Mayor Becky Jean Myers
Mr. Brian Matthew Cutter

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EXHIBIT		FORMALLY MARKED/IDENTIFIED PAGE
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DONALD H. SHANK,
1474 Main Avenue, Suite 223, Durango, Colorado, 81301, was called as a witness, by the Plaintiff, and having been first duly sworn, testified upon his oath as follows, to wit:

EXAMINATION

BY MR. GEORGE M. ALLEN:

MR. ALLEN: It's 10:34 a.m. We are here in Durango, Colorado, resuming the deposition of Donald H. Shank.

Q (By Mr. Allen) Mr. Shank, the Foundation, by which I mean the Denver & Rio Grande Railway Historical Foundation --

THE WITNESS: There is one more person coming in.

MR. ALLEN: Oh, right, right. You can shut it.

THE WITNESS: He'll find his way.

Q (By Mr. Allen) -- presently has an obligation which will come due to the Union Pacific Railroad to pay a substantial amount of money later on this year and then early next year?

A That's correct.

Q How much is that that remains to be paid?

A Two equal payments of 137,308.

Q It is a fair statement, is it not, that the Foundation does not have money in a bank account right now on which it could write a check to make either or both of those payments?

A Not at this moment.

MR. ALLEN: Could I mark this entire document, please, Exhibit 1.

(Exhibit 1 marked for identification.)

Q (By Mr. Allen) I'm handing you what's been marked as Plaintiff's Deposition Exhibit No. 1. It's a copy of the "Petition for Leave to File Offer of Financial Assistance Out of Time and Tendered Offer of Financial Assistance" filed on behalf of the Foundation by its counsel, Thomas McFarland, with the Surface Transportation Board. And the document indicates a date filed of April 2, 1999.

I have opened this to Appendix 2 of this document which is a communication directed to the Board of Directors of the Denver & Rio Grande Railway Historical Foundation from Donald H. Shank. It reads as follows: "Gentlemen: I, Donald H. Shank, do hereby pledge a donation to the D&RG Railway Historical Foundation in the amount of $400,000 to be utilized for the acquisition of the Derrick - Creed right-of-way currently owned by the Union Pacific Railroad Company. The Creede Branch is listed with the Surface

Transportation Board by Docket No. AB-33 (Sub-No." — I think 13230, but I could be wrong about that number — "and includes 21.6 miles of right-of-way and track material. Respectfully submitted this 30th day of March, 1999." Signed, Donald H. Shank.

Handing you that, do you recognize that as your signature?

A I do.

Q Have you, in fact, made that contribution to the Foundation?

A Not as yet.

Q Are you in a position to make that contribution between now and when the first of these payments comes due on September 1st of this year? And when I say "are you," are you right now today in a position to make this $400,000 contribution to the Foundation in order that it can make its September payment to Union Pacific?

A As of today, no.

Q Thank you. The next page, Appendix 3 to the Statement of Financial Condition or to the document filed with the Surface Transportation Board, is entitled, "Statement of Financial Condition for Donald H. Shank as of March 15, 1999."

If you turn the page, you will see the document which has a number of fax notations at the top right. I

want to make sure we're both looking at the same piece of paper. The very top right, it says "Page 12/15." Does that correspond with what you have on the paper you're looking at?

A Yes, it does.

Q And under that, it says "Page 12/28," I think. Then after that, Page 12, this is all the same page on the top right corner?

A Yes.

Q Directing your attention to the line items that are shown here. The first line item says Bank of Durango, checking number, and then it has an account number and the amount of $9200. Do you still have a checking account at the Bank of Durango?

A I do.

Q Is your balance today at or close to $9200?

A I'm not sure.

Q Do you know what your balance is?

A Not at this moment.

Q Can you give us your best estimate of what your available balance is in that checking account?

MR. MICKLEWRIGHT: I'll object to the question. You can go ahead and answer if you can.

A I would guess it's somewhere in the vicinity of 3,000.

Q The next line item says, "First National Bank of Durango" and has a checking account number, and it has the amount of $8,000. Do you still have a checking account under that number in that institution?

A No, I do not.

MR. MICKLEWRIGHT: I'm going to object to this line of questioning. What does this have to do with zoning?

MR. ALLEN: To put it succinctly, the defense you've raised to why Creede zoning is not applicable to the right-of-way is that the right-of-way is subject to the exclusive jurisdiction of the Surface Transportation Board, which you have taken the position defeats zoning.

MR. MICKLEWRIGHT: That's the law, isn't it?

MR. ALLEN: I'm not going to engage in a discussion as to whether it is or is not. That is the position you have taken, as I understand it; and without elaborating on the complexities of whether that is or is not the case, the position, as I understand it, the defense's position, is that this is a railroad right-of-way owned by the Defendants pursuant to an Offer of Financial Assistance. The Offer of Financial Assistance included obligations which are as of yet unmet to Union Pacific;

and, also, it implies an ability to operate a freight railroad. And other representations are made in this document that the Foundation will operate a freight railroad and —

MR. MICKLEWRIGHT: Let me ask —

MR. ALLEN: It's our position — may I finish?

MR. MICKLEWRIGHT: Yes.

MR. ALLEN: I'm answering your question. Our position is that by raising the defense you have that this is a railroad and not subject to local zoning, that puts in play, if you will, the entire question of the viability and capability of actually — who actually owned and operated this railroad.

Because if, for example, the answer I get to my questions cumulatively is, "We don't have any money; we can't possibly pay the Union Pacific Railroad; and we can't possibly ever start hauling freight up and down the line," then that would mean that Creede zoning would be clearly applicable, and we wouldn't have the problem of having to deal with this assertion that it's a railroad that's exempt from zoning. But the pledge, which is a part of the operating rights that were obtained in this Offer of Financial Assistance, is based on the financial statement.

So I want to find out what — A, I want to test, by

deposition examination, the financial statement as to what existed at the time it was made. I assume those answers are going to be that, "This is what was in my accounts or substantially in my accounts." I don't think that anyone is going to quibble over if it was 9200 or $9600 or 10,500 or 7,800, as long as it's in that range. I know most of us on a given day couldn't say exactly what is in our checking account.

And B, in a general way, I want to get a sense of what ability the Foundation has to meet its financial obligations. Because if the Foundation can't meet its financial obligations, then that is obviously germane to the issue of Creede zoning.

MR. MICKLEWRIGHT: Let me ask you, my understanding is that there was an order issued by the Surface Transportation Board on May 6, 1999. Are you aware of that?

MR. ALLEN: Probably. You have to refresh my recollection as to which order.

MR. MICKLEWRIGHT: It was decided in the manner of an Offer of Financial Assistance. Deals with this particular issue. My understanding was that the city was a part of that. Is that correct?

MR. ALLEN: I don't have any knowledge whatsoever. I was not involved in that.

MR. MICKLEWRIGHT: I understand you may not have been involved, but my understanding is that it's the final decision of the administrative board that it's subject to 28 USC 2344 and I'm going to instruct my client not to answer. It appears to me what you're attempting to do is challenge the validity of — the propriety of the board's decision approving the Offer of Financial Assistance.

MR. ALLEN: We accept that is a done deal. I'm trying to find out whether or not these guys can ever haul freight up and down the line.

MR. MICKLEWRIGHT: What does Mr. Shank's financial condition have to do with that?

MR. ALLEN: They have, as yet, unperformed obligations which he just acknowledged. I mean, we've just gotten copies of Promissory Notes.

MR. MICKLEWRIGHT: What does that have to do with zoning? I'm going to instruct him, at this point in time, not to answer any questions with respect to his financial condition. That was based on information provided to the Surface Transportation Board from which your client could have taken an appeal and did not.

MR. ALLEN: You know, I don't know whether my client was a party to that procedure or not.

MR. MICKLEWRIGHT: They were, is my

understanding.

MR. ALLEN: But regardless of that —

MR. MICKLEWRIGHT: Well, they had a right.

MR. ALLEN: The issue in this case is not only this, but also the issues raised by your defense, and your defense is that this is not — this is an operating railroad that's subject to STB jurisdiction.

MR. MICKLEWRIGHT: This appears to be a belated attempt at an appeal that was barred after 60 days by the 28 USC 2344. If you want to call the magistrate, my understanding is he's in this morning, but I'm going to instruct my client not to answer any questions unless otherwise ordered by the magistrate. And I'll file for a Protective Order with respect to those questions.

MR. ALLEN: Let me get all the questions out so we have a fully formed record. And you can take the position you're taking, and I can't stop you from doing that, but I believe that this is the heart of the litigation.

MR. MICKLEWRIGHT: I understand that's your belief.

Q (By Mr. Allen) Okay. Under cash and cash equivalents in the Statement of Financial Condition, Mr. Shank, we see a total figure of $18,700. First, is that a substantially accurate figure as to the time when this

financial statement was given, which is dated March 15, 1999?

A Yes, I believe that's correct.

Q Second question, do you presently have available cash and cash equivalents in a range of, and let's say within that number, plus or minus ten percent, in the amount of $18,700?

MR. MICKLEWRIGHT: I'll instruct the witness not to answer the question.

Q (By Mr. Allen) Under "Notes and Loans Receivable" of the Statement of Financial Condition, it lists a second trust deed receivable of $145,000. Was that a substantially accurate statement as of the time it was made in March of 1999?

A It was.

Q Can you tell us who was the obligor on that trustee?

A It's confidential.

Q Well, it's subject to a confidentiality agreement, but I still want the answer.

A My brother-in-law.

MR. MICKLEWRIGHT: Yeah, it's subject to confidentiality.

Q (By Mr. Allen) Has that been paid to you, or is it still owed to him by you?

MR. MICKLEWRIGHT: I'll instruct the witness not to answer.

Q (By Mr. Allen) I'm not going to bother with other loans receivable for $5400. I don't believe that is a material amount one way or the other. Under investments, there is a line item titled, "Investment with Jeffrey Matz," M-A-T-Z, "Esquire, Phoenix, Arizona." Principal amount of $100,000 and profits earned as of 3-20-99, available 4-1-99 of $87,500. So the two taken together would be $187,500. Was that a substantially accurate statement at the time it was made?

A At the time it was made.

Q Do you presently have an asset of that kind or character having approximately that value with Mr. Matz?

MR. MICKLEWRIGHT: I'll instruct the witness not to answer the question.

Q (By Mr. Allen) The next line item is "Stock in privately held corporations." There are three line items. Two are for 5,000 each. I won't bother with them. The third is Borrasca Land and Development, 50 percent owner. First, did I correctly pronounce that?

A Borrasca.

Q Could you spell it for the reporter so we have a clean record.

A B-O-R-R-A-S-C-A.

Q Borrasca Land and Development, 50 percent owner, and it's shown as a line item of $125,000. Was that a substantially accurate figure at the time that representation was made?

A It was.

Q And do you presently have a 50 percent ownership in Borrasca Land and Development?

MR. MICKLEWRIGHT: I would instruct the witness not to answer the question. Let me restate the basis for the objection. My understanding is that this question has nothing to do with zoning, that it is a belated attempt at an attack on the Offer of Financial Assistance and that to do so would be a violation of 28 USC 2344.

Q (By Mr. Allen) The next line is -- I'm going to back up. Regardless of whether you have any interest in it or not, does Borrasca Land and Development still exist as an entity?

A No.

Q Next line item shows "The Mortgage Station, LLC, 50 percent, and then in parens, (with wife), close parens, $40,000. Was that a substantially accurate representation at the time it was made?

A Yes.

Q Now, as I understand it, at the time of this

financial statement in March of 1999, you were married?

A Correct.

Q And you are no longer married?

A That's correct.

Q Are you still involved in a business called The Mortgage Station, LLC?

A No, I am not.

Q The next line item is "Air Park Village, LLC," 50 percent ownership. Excuse me. Shows a line item of $250,000. Was that a substantially accurate representation at the time it was made?

A It was.

Q And you own -- when this says 250,000, does that mean that the total of Air Park Village, LLC, was 250 and your 50 percent was 125, or does that mean the total was 500 and your equitable interest is 250?

A The figure represented here is representative of my 50 percent.

Q So then presumably the total then for the entire worth of Air Park Village, LLC, would be about $500,000?

A Yes.

Q These are all even numbers. I assume there was not an attempt to state these all out to the last decimal and that these are approximations. Is that fair to

say?

A That is correct.

Q Is Air Park Village, LLC, still in existence?

A It is.

Q Are you still a 50 percent owner?

A I am.

Q Will you tell us whether or not 250,000 is a fair figure for your approximate ownership today?

MR. MICKLEWRIGHT: I'll object and instruct the witness not to answer the question.

Q (By Mr. Allen) With regard to the final line item here under "Land and Business, 22.66 acres, Highway 160 East," 100 percent owner. I assume that's Highway 160, US Highway 160 in La Plata County, Colorado?

A That's correct.

Q Is that figure, 450,000, a substantially accurate figure as of the time this representation was made?

A It was.

Q And are you still the owner of that property?

MR. MICKLEWRIGHT: I'll instruct the witness not to answer the question.

Q (By Mr. Allen) Well, is there still

property at that location having roughly that configuration, 22.66 acres?
A There is.
Q Where is that located on Highway 160?
A That property is located — if you're familiar with Farmington Hill?
Q I am.
A That's the intersection between 550 and 160. It is approximately half a mile east on the north side of Highway 160.
Q Other assets there is shown a figure of $495,000 for personal residence in Agoura, California, held jointly. It says "held jointly." I assume that was held with your former wife?
A Correct.
Q Was that a substantially accurate figure at the time it was made?
A It was.
Q Do you still have any ownership interest in that property?
A No, I do not.
Q Was your ownership interest — where this says "personal residence, jointly," is 495,000 the net equity held by both you and your wife at that time?
A Correct.

Q Did your divorce take place in California?
A Yes.
Q And this was, therefore, a California community property, if you know?
MR. MICKLEWRIGHT: Objection. Calls for a legal conclusion.
MR. ALLEN: He can still answer if he knows.
MR. MICKLEWRIGHT: I know. If you know.
A I do not.
Q (By Mr. Allen) In the course of becoming divorced, did you receive any part of that property or payment in return for your share of that property?
MR. MICKLEWRIGHT: I'll object and instruct the witness not to answer the question.
Q (By Mr. Allen) I'm not going to bother with the 1995 Ford Explorer. "Personal furnishings, rare art, ancient and modern coins," $213,000. Was that a substantially accurate statement at the time it was made?
A Yes, it was.
Q Were those things that were owned exclusively by you, or were they owned jointly by you and your former wife, or would it be a little bit of both?
A I believe this was predominantly owned by me, what is represented here.
Q Were these items that were in the house in

Agoura, California?
A No. These were items in the home in Colorado.
Q Do you still retain the ownership of substantially all of the items that were described in this line item as personal furnishings, rare art, ancient and modern coins?
A I believe so.
Q Does anyone else own any interest in those?
A The only other person that might have an interest in those would have been my wife. I'm not sure if they are or not.
Q Do you know who your insurance carrier is?
A Not right off the top of my head.
Q Sorry?
A No, I don't.
Q Do you know who your insurance agent is?
A For automobiles.
Q Let's say you went to your house and you found that it had burned down or your neighbor told you that before it burned down, somebody came in and took a truckload of stuff out.
A Yes.
Q Who would you call to report the loss?
A Probably call my sister.

Q Why?
A She had been my insurance agent for a long time.
Q And presumably she would know who has the coverage?
A She probably would.
Q What is her name?
A Margien Gram. M-A-R-G-I-E-N. Last name G-R-A-M.
Q Where is she?
A Durango.
Q Do you know her phone number?
A 259-5119.
Q Is it okay with you if we call her or somebody working with us calls her to find out who your insurance agent is?
A No, it's not all right.
Q Okay. Turning to the next page of Plaintiff's Exhibit 1. Just so we're on the same page, at the top right, do you see a notation, a fax notation, that says all the way across the page, "from Ball Janik, LLP," and then it has a phone number, and then it says "Page 13/15?"
A Yes.
Q This shows "accounts and credit cards

payable" of $21,300 as of March 15, 1999. Was that a substantially accurate figure as of the time it was made?
A It was.
Q Contracts payable, a lease on the Durango residence of $9,000, and I'm not clear what that means. Does that mean that you owed $9,000 to someone?
A The balance of the lease was $9,000 payable at 1500 a month.
Q So you were leasing the house in Durango?
A That's correct.
Q For 1500 a month and you had six payments left on the lease?
A That's what is represented here.
Q And then there was an auto lease payment of $377 a month?
A Correct.
Q Okay. First Trust Deed to Bank Boston secured by a personal residence. Would that have been secured by the residence in Agoura, California?
A That's correct.
Q That was 62,000?
A At the time.
Q Was that a substantially accurate figure at that time?
A It is.

Q I take it, since your divorce, you're no longer obligated on that. Is that correct?
MR. MICKLEWRIGHT: I'll instruct the witness not to answer that question. Same objection.
Q (By Mr. Allen) Okay. The next line item indicates a First Trust Deed to Charles Shafer, II, secured by the 22.66 acres on Highway 160 for $93,000. Is that a substantially accurate number as of the time that this was made?
A It was.
Q Where would one find Charles Shafer if one were looking for him?
A Well, I would suspect you'd look for him in his office here in Durango.
Q Is he a businessman, lawyer, or doctor? Or what does he do?
A Leave off the doctor and you had it right. Businessman and lawyer.
Q Okay. And then there is a second deed of trust to Lauer McAtee. Have I said that correctly?
A Yes. It's two gentlemen.
Q Are they also Durango businessmen?
A They are.
Q Could you give me their full names?
A Robert Lauer. Sorry. William Lauer.

L-A-U-E-R. And Robert McAtee. M-C, capital A-T-E-E.
Q Do you still have an obligation to either Mr. Shafer or Mr. Lauer or Mr. McAtee secured by this 22.66 acres?
MR. MICKLEWRIGHT: I'll object and instruct the witness not to answer the question.
Q (By Mr. Allen) Generally, with regard to these two pages that we've just looked at, which were the Statement of your Financial Condition as of March 15, 1999, are these two pages generally substantially accurate as to your financial position at that time?
A I believe so.
Q What are the financial resources available to the Foundation for it to get from where it is right now in terms of what it owns, what it does, what it's able to do, to a point at some future time at which it can start to operate freight rail service to the city of Creede?
A The financial strength and financial availability to the Foundation comes from the donations, pledges, grants from private individuals, businesses, other organizations or foundations.
Q Does the financial ability of the Foundation to get to a point where it might begin to operate freight rail service depend, to any extent whatsoever, on receipt of any part of the $400,000 pledge you made to it?

A No.
Q I'd like you to detail what donations, pledges, and grants you anticipate the Foundation will receive between now and September 1st of this year.
A Well, I'm not positive what's going to be coming in between now and then. We've been so damaged by this lawsuit that's levied against the Foundation by the city of Creede and, of course, against myself. It's a matter of public record. We have been — we've had investors that were coming into this project that left as a result of the pending litigation. We've received a substantial amount of negative press continually as a result of this. So we've been damaged through the course of this suit. Union Pacific recognizes that fact.
MR. MICKLEWRIGHT: My understanding of the question is: You want to know what he expects is coming in?
MR. ALLEN: Yes.
MR. MICKLEWRIGHT: Right. If you know.
A I don't know at this moment.
MR. ALLEN: Ray, I would appreciate not having colloquy or objections which tend to suggest an answer.
MR. MICKLEWRIGHT: Okay. I don't want him to just ramble on. I want him to just answer the question.

MR. ALLEN: We've had deposition notices out continually since February, and I would think that you've had more than ample opportunity to counsel with Mr. Shank as to how to deal with questions in a deposition without doing it live here and in person. And he strikes me as a pretty smart guy. If he doesn't know, he's able to say he doesn't know without a suggestion from you that he ought to say he doesn't know.

Q (By Mr. Allen) Based on your history of receipt of donations, pledges and grants, what is the rate at which you have been receiving funds from those sources for the Foundation over, say, the past year? That would take you back to, let us say, the last two quarters of calendar 2000 and the first two quarters of calendar 2001.

A The rate of receipt of donations and pledges has slowed to a trickle as a result of the negative impact from this suit.

Q How much have you spent in legal fees on this suit today?

A I'm not positive. Based on current billings, in my position, I know there's still stuff to be billed. It's well in excess of 20,000.

Q How much has the Foundation actually paid?

A Well in excess of 20,000.

Q That's actual payment out?

A Yes.

Q Has any other party, individual entity, corporation of any kind or nature financed any part of the Foundation's expense or your personal expense in defending this litigation?

A No.

Q For example, have the Wilkersons, who are also involved in the litigation with the city of Creede in which they were represented by the same counsel who represents you, assisted in any way with financing this litigation?

A No.

Q Was there any request made of them to do so?

A No.

Q Did they make any offer to do so?

A No.

Q Has there been any coordination with them or communication with them about this litigation?

A The only communication that I had with Mr. Wilkerson was pertinent to the fact that his counsel, in his estimation, was excellent; and he recommended Mr. Micklewright.

Q I think that was good advice.

A I agree.

Q He's a tough opponent. I'm perplexed and I

want to share my thoughts with you and then base questions on them. It strikes me that getting actual freight rail service up and running between wherever one would contact the Union Pacific, I guess Derrick or out beyond Derrick if they no longer come to Derrick, up to Creede, it's an undertaking that is going to require a lot of work. Bridges have to be dealt with, track, ties, equipment, etc. And that even assuming that you can get some of that done the way you described in your last deposition, by volunteers, buy some things at auctions, buy some things at discounts, we're still talking about an enterprise of a magnitude of at least hundreds of thousands, if not, in the millions of dollars, to do that. It involves running a railroad, which historically in America has been seen as a big undertaking.

A Yes.

Q You and your counsel have consistently referred to this litigation as being unfounded and you describe having spent about $20,000 to defend it, which, frankly, in the context of current commercial litigation is a trivial amount of money.

A I believe my statement was well in excess of $20,000.

Q Well --

A Whatever the case may be.

Q Well, currently, I'm trying to lay a foundation for the question. I know, without knowing specifics, that from one day to the next, a company such as United Airlines undoubtedly gets sued over people who trip and fall and get injured on their property and things like that.

A Yes.

Q Or employees who think they got a bad deal and sue the company for claim benefits they're owed or whatever. I would imagine that the Durango and Silverton Railroad has litigation pending against it virtually at all times. You know, employees -- people who have claims or damage from, you know, whatever.

Any complex business enterprise has litigation going on most of the time. But I've never thought or had occasion to believe that simply because there might be some lawsuits pending against United Airlines over somebody who got hurt on the premises or hurt on an airplane or lost his baggage or whatever, that that calls into question whether or not United Airlines is going to be able to pay for jet fuel to fuel up the 747s to fly to Honolulu tomorrow.

You're describing, as I understand it, a lawsuit of relatively modest dimension that is now only in its second day of depositions, which still has cost your company or your foundation an amount in a modest five-figure range, as

having had a paralyzing effect on your enterprise.
MR. MICKLEWRIGHT: I'll object to that as mischaracterizing the evidence.
Q (By Mr. Allen) Well, okay, and if you'll just indulge me for a moment. My choice of words may be inapt, but what I'm trying to convey is, I don't see how, if your foundation had a reasonable chance of getting this railroad running, a lawsuit such as this one, which so far has cost you 20 or $30,000, could possibly have had any adverse impact on your ability to get this railroad going, if you indeed ever had an ability to get it going. Can you tell me why I'm wrong in that analysis?
MR. MICKLEWRIGHT: I'll object as argumentative. If you can, answer it.
A I'll answer the question. First of all, you're basing your assumption, your feelings, on the legal cost to defend. Where I have stated to you on more than one occasion, we have been damaged by the adverse effect of negative publicity, the stigma attached to the suit. The 20 or 25, $30,000 that we discussed in the cost to defend is a fraction of the damage done by the negativity attached to a lawsuit.
There is so much information that is placed in newspapers and tabloids, on the Internet, regarding this very situation that has had a very large rippling effect

negatively for the Foundation. It's not the monetary loss that is so crippling. I hope you understand that now.
Q (By Mr. Allen) But — okay. Let me try it another way. If you wrote a check to the Foundation for $400,000 tomorrow and that check cleared the bank and the Foundation had that $400,000 in its account, would it not then be able to make its payments to the Union Pacific and make a lot of the other expenditures it needs to make in order to start running freight rail service?
A It could meet those expenses if that is the course and direction that we choose to go. If the funds were there to make a payment to the Union Pacific and it was the appropriate time to do so, that's the course that we might take. We are in constant communication with the Union Pacific Railroad. They are quite sympathetic to this situation.
Q If this lawsuit had not happened, what would have been anticipated to be the revenue to the Foundation for, say, this calendar quarter by August and September 19, 2001, from donations, pledges and grants?
MR. MICKLEWRIGHT: I'll object to the question. It calls for speculation. If you can, answer it.
A It does call for speculation. I don't know, because that's not the case.

Q (By Mr. Allen) You mentioned tabloids and the Internet. Can you name or identify any tabloids or Internet communications that you have seen with respect to this litigation?
A There are some railroad discussion groups that are on the Internet that are there constantly. I don't remember the exact names. There are a number of them out there. I get stuff sent to me occasionally by e-mail. I know the city manager took it upon herself in one of the railroad magazines — may have been — I'm trying to remember the name. "Railroad Preservation Magazine." Where she wrote an article depicting the position of the city and how they felt I was going to damage the lifestyle and quality of life within Creede. There's been a number of things that have been in place. I can't specifically give you names per se at this moment.
Q To what extent, if at all, do you think that your initiating criminal charges against the Creede residents may or may not have contributed to negative attitudes towards your enterprise within Creede?
MR. MICKLEWRIGHT: Objection. Relevance. You can answer the question.
A It should have created an awakening for people to realize that those folks broke the law. I'm not the one that did; they are.

Q (By Mr. Allen) What was the outcome of those prosecutions?
A I made a goodwill gesture at the holidays. I dropped the charges. The DA said we had a case and a strong one at that.
Q Who is the DA?
A He's over in Alamosa. Sorry. I don't remember his name.
Q Did he say that to you personally?
A Yeah.
Q When did he say that?
A At the time I dropped the charges.
Q Did he urge you not to do so?
A He said, "You have a case. It's up to you." They wanted to send me some victim -- what is it called? Victim compensation forms?
MR. MICKLEWRIGHT: Victim impact statements?
A Something along those lines, but I said, "No," that I want to drop this issue. I want people to clearly understand that we would not tolerate individuals breaking the law, damaging property of the railroad. And during the holidays, I chose to drop the charges as a goodwill gesture.
Q (By Mr. Allen) Have you kept copies of these Internet communications that you say have damaged you

within the railroad groups?
A I may have a couple of them. Most of them I just trash.
Q We just spent two hours going through what were represented to us to be all of your records, and I didn't see any such communications.
A Then I must have trashed them.
Q By tabloids, are you referring to an article in the "Westword Magazine" in Denver?
A That was certainly a large article that ran.
Q Have you made any demand on "Westword" for retraction or correction?
A No.
Q Do you, within the Foundation, maintain any relationship either in-house or on a consulting basis with any firm handling public relations?
A Not at this time.
Q Is there any reason not to have retained public relations counsel for the Foundation?
A Is there a reason why we did not?
Q Right.
A We simply did not do it at this time. We wanted to get further into this project.
Q Have you ever been involved as an executive officer in any other business enterprise of this size or

complexity?
A Are you talking railroad related, or are you talking about just --
Q Anything.
A I've been involved in a number of businesses.
Q As an executive officer?
A Yeah.
Q Is it a fair statement that many, if not most, businesses that have say assets or a scale of operation of a million dollars or more engage either in-house staff people or engage outside public relations consultants?
MR. MICKLEWRIGHT: I'll object to the question. Calls for speculation. If you know what most companies do.
A I'm not going to speak for most companies. I know where we are with this foundation at this moment and, at this moment, that is not an avenue we are pursuing.
Q (By Mr. Allen) So your foundation does not have any structure by way of someone whose job it is to monitor press comment, for example, or Internet comment and respond to it and provide public information to deal with what you characterize as negative publicity?
A That's not correct. I myself personally

respond to most. There is a lot of information that comes across that I simply get rid of. There isn't time to respond to everything that we see, everything that we get. I do make it my goal to respond to as much of it as I can. And as far as -- you know, I field a lot of phone calls, but then I'm also in the field a lot rebuilding the railroad.
Q Has your foundation done anything proactive to deal with its negative image problems?
A We have.
Q Describe what that has been.
A We show the public our progress with this project on an unofficial Web site on the Internet.
Q Is that site up and running now?
A It is.
Q What is the URL for that route?
A www.wagon-wheel-gap-route.freehomepage.com.
Q Wagon-wheel-gap-route dot?
A Dot freehomepage.
Q All one word?
A All one word, dot com.
Q Do you monitor the number of hits on that site?
A I don't. The people who own the site do.
Q Who owns the site?

A Richard Cutter.
Q Do you know from him the number of hits on some regularized basis, daily, weekly, monthly?
A Not at this moment.
Q Do you have any sense of the number of unique visitors to that site on any recurring basis?
MR. MICKLEWRIGHT: Objection. Relevance. If you can, answer the question.
A I'm not sure what the number is.
Q (By Mr. Allen) Do you have any sense of the number of page views on any recurring basis, daily, weekly or monthly?
A Not at this time.
Q Do you know how many pages are on the Web site?
A I believe it's -- including photographs, I don't know. Somewhere around ten. I'm guessing.
Q Is it an interactive Web site?
A No.
Q Is there information on the Web site about making donations to the Foundation?
A There is now again. We removed that by virtue of agreement between the counsel.
Q How long has this Web site been up and running?

A Back up in its current form, I'm guessing, a couple months.
Q You took 20 or 30 seconds to come to that answer. Are you not quite sure about how long it's been up and running?
A Not exactly. I believe it's around a couple of months.
Q Have you ever conducted a media tour of any part of the right-of-way?
MR. MICKLEWRIGHT: Objection. Relevance. If you can, answer the question.
A Have I taken a media tour of the right-of-way?
Q (By Mr. Allen) Have you invited, for example, railroad publication writers to come and visit you and escorted them up and down the line?
A We had a number of railroad people out there. We had a commercial video production company out there. Spent the entire day. And he was so excited by what he saw, he even hopped off his camera and helped us work. He made a commercial of all the tourist railroads in Colorado and some new footage of the old Denver Rio Grande. It's a rebirth of the old name "Rio Grande." It was commercially marketed worldwide.
Q Was he working for you?

A No. Railroad Productions, I believe, the name was.
Q How many media people would you estimate you personally have escorted up and down the line?
MR. MICKLEWRIGHT: Objection. Relevance.
A Oh, probably 25.
Q (By Mr. Allen) How many of them have been concerned about this litigation?
MR. MICKLEWRIGHT: Objection. Calls for speculation. State of mind of others.
A I have no idea.
Q (By Mr. Allen) How much — have any of them said to you, "We're worried about this litigation"?
A Most of them say it's very unfortunate. Most of them feel that it is absolutely an appalling situation, very much unwarranted.
Q Can you give me the name of some of these people?
A That have been on the line?
Q Yes. And have made remarks to you that the litigation is unwarranted.
A Well, the gentleman from Railroad -- Railway Publications. I think it was Les Jarrett.
Q Say again.
A Les Jarrett. J-A-R-R-E-T-T, I believe it

is.
Q Where is he?
A Back east somewhere. I've got a video from him.
Q Can you name any others with whom you have had communication, other railway media persons?
A I can't pull them off the top of my head at this moment. There have been a number of people out from different magazines. Jason Midyette from the Colorado Timetable.
Q M-I-D --
A Yes. M-I-D-Y-E-T-T-E. Jason. Mark Hunter, freelance writer, "Denver Post." A gentleman from "Trains Magazine," whose name escapes me at the moment.
Q What either metro, daily, financial section newspapers or regional business newspapers would you say are relevant or germane to your market?
MR. MICKLEWRIGHT: Objection to foundation. Market for what?
MR. ALLEN: Well, for whatever. For soliciting donations, obtaining grants.
MR. MICKLEWRIGHT: Fund-raising?
Q (By Mr. Allen) I would assume the "Denver Post" and "Rocky Mountain News" are both of consequence of how you project information about your foundation. Is that

a fair statement?
A I don't know how vital the "Denver Post" would be. I mean, it obviously reaches a number of people within the state of Colorado. We have been in there in the past. We are going to be in there again. We are listed in "The Colorado Timetable," which goes out nationwide.
Q There is a publication called "Four Corners Business Journal." Is that correct?
A In Durango, yes.
Q Are you acquainted with them?
A Yes.
Q Who are the beat writers or who are the people who would normally have responsibility for covering your enterprise on that publication?
A I don't remember the name.
Q Do you know what beat writer or what persons on the "Denver Post" financial section would regularly cover western slope business activity such as yours?
A No. Do you?
Q As a matter of fact, I do, but I'm not being deposed.
A That's good. I'm glad, George.
Q Do you know what beat writers or people would normally have the responsibility on the business section of the "Rocky Mountain News" to cover activity such

as yours?

MR. MICKLEWRIGHT: Objection to relevance.

MR. ALLEN: I'm trying to get out, Ray, why it is that they're not having success in coming up with enough money to operate a railroad.

MR. MICKLEWRIGHT: Why don't you just ask him that?

MR. ALLEN: Well, I'm trying to nail down the details and what I got was a conclusory statement that this lawsuit, which you've routinely characterized as trivial, has effectively put them out of business. And what I'm driving at is, I think there's a lot of other reasons why they're not getting money and a lot of it has to do with not having a competent structured public information forum or a competent structure by the executive officer to deal with communication with the public and not this lawsuit.

I mean, most of the public doesn't go into 1929 Stout Street every day to see what's going on in the Federal Court, but they do read newspapers every day.

MR. MICKLEWRIGHT: My understanding is that the Plaintiff's claim in this lawsuit is that its 1972 residential zoning is applicable to the former Denver & Rio Grande Western Railroad right-of-way in that part of the city of Creede known as South Creede, and I don't see what

these questions have to do with whether or not Creede's zoning ordinances are applicable. That's my objection as to relevance.

MR. ALLEN: You persuaded Judge Babcock to issue an order saying that it's federal jurisdiction based on the anticipated defense that because this is an operating railroad, that it's subject to or arguably subject to the exclusive, maybe even preemptive, jurisdiction of the Surface Transportation Board.

Therefore, whether or not this is or is not a railroad seems to us, at least since you raised that defense, as being at the very core of the litigation. And I think if you look at Judge Babcock's order denying remand to the state court and finding federal jurisdiction, Judge Babcock thinks that whether or not this is an operating railroad is at the very core of this litigation. I don't know. I can't read his mind, but since he said, "No, there is a federal question here based on an assumed defense that this is a railroad and that railroads are subject to STB jurisdiction," and that is an inherently federal question, then it seems to me that when all you see driving through Creede are some tracks that haven't had a train on them in a couple of decades, that questions as to when, whether and under what circumstances, if any, there ever might be an operating train are directly relevant to whether or not

there is a preemption defense or a preclusion defense that you've raised. You've said we're not subject to zoning because we're a railroad.

MR. MICKLEWRIGHT: No, that is not what I said. You mischaracterized not only the law, but you mischaracterized the facts. I have said that, and I maintain that, it is absolutely true that the city of Creede's zoning ordinances can regulate the railroad to the extent they do not usurp federal law. Okay. That's clear.

MR. ALLEN: Okay. What I want to get at is whether or not there really is a good faith basis to believe that this entity which your client has described as being financially distressed, and distressed because of this litigation, is ever going to be able to carry out common carrier freight interstate rail service.

He said in his last testimony in your office that he did not think that there was any realistic chance that that would happen before Memorial Day 2002. What I'm trying to get at is whether there is any reasonable basis to believe, for whatever reason why, whether it's this lawsuit, whether it's just that it was a wild and crazy idea that wouldn't work or whatever, whether there's any reasonable basis to believe that at any time that anybody can predict or foresee anybody is going to have a locomotive hooked up to freight cars hauling freight for interstate commerce.

MR. MICKLEWRIGHT: That's not the issue in the lawsuit. The issue is, will the city of Creede be able to zone those activities? And the issue is, to the extent that the city of Creede will be -- the city of Creede will be entitled to zone railroad activities of my client to the extent that they are not preempted by federal law. So imagine a railroad --

MR. ALLEN: The preemptive law depends on operating a freight -- carriage of freight. That's where your preemption comes from. It's your assertion that there is a preemption because this is an STB function. The only STB function under 49 USC Section 101 -- 49 USC Section 10101 provides that if you're engaged in interstate common carriage of freight by rail, then you're subject to the exclusive jurisdiction of the STB under certain circumstances. Then there is some decision of law to the effect that some non-railroad activity on the railroad right-of-way may be subject to some local jurisdiction, applications of police policies.

What I've been trying to get at in the face of two fairly stark facts, is: One, no trains are operating; and, two, your client has testified that when you put it altogether, there's financial distress, which he attributes to this lawsuit. Well, whether it's attributable to this lawsuit or otherwise, it seems to me that financial

distress to the point of not being able to carry freight is of tremendous relevance as to whether or not your defense is really applicable, which is why I'm really asking these questions.

MR. MICKLEWRIGHT: Well, my defense is -- our defense is that if railroad activity takes place, the city of Creede is entitled to zone to the extent that its zoning laws run up against federal laws which preempt the city's zoning ordinances. Okay. Otherwise, this issue is just an exercise in intellectual curiosity. But what I think it is, and what I've indicated to my client, and that's why I've instructed him not to answer, is that your client failed within 60 days to file an objection to the acceptance of the Offer of Financial Assistance and is now trying to come in through the back door and ask a whole bunch of questions as to whether or not the Offer of Financial Assistance is viable. I'm not going to let you do that.

MR. ALLEN: Okay. Part of the Offer of Financial Assistance is that this guy is going to write a check for $400,000. He just testified he's not going to write a check for $400,000.

MR. MICKLEWRIGHT: I think that mischaracterizes the evidence.

Q (By Mr. Allen) Are you going to write a

check for $400,000, Mr. Shank?

A Your question to me before was, "Can you write that check today?" And I said, "No, I cannot today."

Q Can you write -- do you believe it is reasonably likely that you can write, the Foundation -- a check will clear the bank for $400,000 between now and September 1, 2001?

A I have good reason to believe I could.

Q From what sources?

MR. MICKLEWRIGHT: I'll object.

MR. ALLEN: Well, now, we are --

MR. MICKLEWRIGHT: I'll instruct him to not answer the question. First, I don't think it's relevant. Second of all, I think it goes to the issue of challenging the Offer of Financial Assistance. And, third, he answered your question, and I think that's all you're entitled to ask. Now, we can call the magistrate, and let's cut to the chase.

MR. ALLEN: If we are going to have this issue before the magistrate as to whether or not we're entitled to inquire into his personal financial capacity, we're going to have it before the magistrate based upon the full record which will include the record. And I believe -- and I know he said, "Call me up." But, to us, this is an issue of vital importance and I'm going to have

it properly presented. I'm not going to try to do it in a telephone call.

MR. MICKLEWRIGHT: I recall him sort of chewing me out because of the last time that I instructed the witness not to answer and I didn't take action immediately.

MR. ALLEN: Well, he told you you've got ten days to file your motion. I don't think you can possibly file a proper motion for a Protective Order based on relevancy, which is essentially what you're saying.

My position is, whether it's relevant or not, it's a proper inquiry because it might lead to the discovery of admissible evidence; and, therefore, we're entitled to inquire into it, but I also think it's darned relevant.

I take it we're at an impasse. Is that fair to say? If you want to make an offer of proof of what you will provide us, I will welcome that and an opportunity to inquire into it, but what we have right now is a statement that he thinks by September 1st he can provide the Foundation with $400,000. And you have directed him not to say how he's going to do that.

MR. MICKLEWRIGHT: I think he has indicated in his Offer of Financial Assistance his financial situation as of the day he was required to submit it.

MR. ALLEN: And you are refusing to allow us

any inquiry into whether or not that continues to be a valid representation of approximately the scale of what he has available today?

MR. MICKLEWRIGHT: As I understand the Offer of Financial Assistance, if you wish to challenge it, then you're going to have to come up with some evidence on your own to reopen the case, but, otherwise, your client has missed its appellate deadline, and this case is not the appropriate forum or jurisdiction. It's the Court of Appeals.

Q (By Mr. Allen) Mr. Shank, I'll try to come at this another way. There have been, over the past several years as a matter of public record in the court of La Plata County, several lawsuits filed against you which I think would fairly be characterized as collection cases, things on your Visa account, things like that, which would cause one to think, absent being furnished some other evidence, that whatever your financial condition may have been in March of '99, that you may not have had the means either before that date or subsequent to that date to make Visa payments of 10 or $15,000 and so forth.

Can you provide us with any testimony or any documents to counteract the inference I have drawn, from looking at copies of those pleadings, that there was some inability on your part to meet those obligations?

MR. MICKLEWRIGHT: I'll instruct the witness not to answer that question. And would you mark that question and my objection?

THE REPORTER: (Nodding head.)

MR. ALLEN: Ray, is there anything you can give us that will give us any comfort whatsoever as to Mr. Shank's resources or means of performing on the pledge that is the backing for the Offer of Financial Assistance?

MR. MICKLEWRIGHT: Let's go off the record.

(Discussion off record.)

MR. ALLEN: We've been off the record for seven minutes and forty-five seconds. We're back on the record.

Q (By Mr. Allen) Just to summarize, the Foundation could not draw on funds right now that it has in liquid form, bank accounts, negotiable securities, etc., to make a payment to the Union Pacific? What is the amount due in September?

A It's 137,308.

Q And the Foundation does not right now today, August 3rd, have that amount in liquid funds. That's a fair statement. Is it not?

A That's a fair statement.

Q Other than your pledge that we have been talking about made back in 1999, the Foundation does not

have any other contractual undertakings from any other sources who have contractually obligated themselves to pay you money between now and then, to pay you money. That is also a fair statement. Is it not?

A Contractual sources to pay me or the Foundation?

Q The Foundation. In other words, there isn't somebody at, say, the Ford Foundation in New York City who has written you a letter and said, "We have agreed that we will wire transfer $137,000 to you on or before Labor Day so that you can make that payment"? There is no such undertaking out there at this time that you have documented and that you believe you could enforce against a donor or contributor or purchaser of something or whatever?

A Not at this time.

MR. ALLEN: Let's take a break.

(Lunch recess taken.)

MR. ALLEN: Okay. It's 14 minutes after 1:00. We've been on a break since about 11:45 this morning.

Q (By Mr. Allen) I want to direct your attention to Plaintiff's Exhibit 1, the page that is marked "8/15" at the top right corner. Do you have that in front of you?

A I'm getting there.

Q Now, this describes what the Foundation had as of November 30, 1998. Am I correct in that regard?

A Yes, this was. You're mostly correct. There was a few items on here which were pledged, committed for donation, which have yet to take place.

Q Maybe rather than my trying to go through it line item by line item, you can identify what those are right now, which items on here you expect to get or did expect to get that have not yet occurred.

A 1881, RGS Narrow Gauge Passenger Coach. Sorry. Coach 252 was acquired, but not acquired by the Foundation.

Q Who acquired it?

A I did. It was supposed to be a donation to the Foundation, but at the last minute, the people decided they wanted a significant amount of money for the car. I wound up purchasing it myself.

Q What do you mean by "a significant amount of money"? What is the dollar amount?

A Twelve-five.

Q Twelve thousand five hundred dollars?

A Yes. Significant in terms of typical railroad car bodies. That was a fairly large amount.

Q Okay.

A 1880 D&RG Narrow Gauge Coach 274 and Pullman

Car 251 are still pledged that are not consummated as of this moment.

Q Who made those pledges? Who owns them now?

A Well, the cars technically are owned by the Catholic church. They're utilized by a youth camp as interim housing. Although they're not user friendly, they recognize that they have far more historic value to a railroad than they do to a youth camp. So it's a situation where they still are working to acquire the camp from the Catholic church. And once that is complete, they're donating the cars to the Foundation.

Q Who's "they"?

A Mountain Trails Youth Camp.

Q Okay. Where is it located?

A The office for the Mountain Trails is in Monte Vista.

Q Going down to "railroad memorabilia and artifacts."

A Yes.

Q Lantern collection.

A Uh-huh.

Q Is that actually owned by the Foundation?

A It is.

Q "Photographic and 8 millimeter movie collection." Is that owned by the Foundation?

A Yes.
Q "Historic paper collection"?
A It is.
Q "Associated artifacts, switch stands, rail, spikes, car seals," etc. Is that owned by the Foundation?
A It is.
Q Would this $65,000 value be, on those aggregate items, memorabilia and artifacts, be a valid number running pretty much continuously from 1998 when this was done through '99 or 2000 when you acquired the OFA rights?
A Yes. That would be a minimum value.
Q Would it be about the same value today?
A Certainly. Every bit of that.
Q Tell me; does the Foundation have things like this insured? Do you carry insurance on it?
A It's carried under insurance and in its present location by the donor, by donors. The Foundation, at this time, is not housing this collection on a Foundation site.
Q Are these in different donors' locales?
A They are.
Q So far as you know, have the donors actually transferred these things to the Foundation in terms of legal title?

A They have. Although there is not a document that supports this specifically, it is understood.
Q So there would not be, for example, a business comprehensive insurance policy that the Foundation has that would have these items insured?
MR. MICKLEWRIGHT: Objection. Relevance. If you can, answer the question.
A Not currently. When we actually take possession of these items and place them in a Foundation facility, then the Foundation will insure the collection.
Q (By Mr. Allen) There are no bills of sale or transfer documents on these items?
A No.
MR. MICKLEWRIGHT: Objection to this line of questioning. Again, I think this goes to the OFA issues that I've already indicated your client has missed because they have failed to file an appeal timely to challenge the Offer of Financial Assistance. The documents speak for themselves. They're available as a public record and I'm going to instruct my client not to answer.
MR. ALLEN: What documents are available?
MR. MICKLEWRIGHT: Where did you receive these?
MR. ALLEN: Looks to me as though I got this from Ball Janik in Washington. That's the fax code at the

top of my copy.
MR. MICKLEWRIGHT: Well, I don't know how you obtained it, but my assumption is -- if you obtained it, then my assumption is, unless it's subject to the confidentiality agreement, it's otherwise public record, and I will instruct my client not to answer any questions regarding the Offer of Financial Assistance other than what's provided in the document here.
Q (By Mr. Allen) Okay. Let's move to the "model railroad collection." I see three line items, "Lionel Train collection, American Flyer collection and SA3 N scale and miscellaneous" totaling $152,000. Were those items, in November of '98, in the physical possession of the Foundation?
A Not in the physical possession, but readily available.
Q Have they been transferred to the Foundation in terms of legal title to them?
A Verbalized, but not in a formal document.
Q Who is the donor or the holder of those items or holders, plural, if it's more than one?
A My father, my brother, and myself.
Q Do you know whether any of those three individuals, your father, brother, yourself, have taken tax deductions for donations to the Foundation for these items?

A We have not.
Q Do you know whether or not the donors of the railroad memorabilia and artifacts that are listed in the heading above have taken charitable deductions for donations of these items to the Foundation?
MR. MICKLEWRIGHT: Objection to the form. If you can, answer the question.
A They have not.
Q (By Mr. Allen) Do you know whether there have been any appraisals on any of these items to support these values?
A A lot of those values can be substantiated, validated by publications that are readily available.
Q In other words, there are catalogs and circulars that go around the railroad community that would have comparable things for sale so you can say if you have a Lionel Train collection of X number of cars, engines, etc., that you could look in the catalog or what's available now and effectively price your stuff based on the prevailing prices?
A Exactly correct.
Q This land in Silverton, Colorado, donated for cash conversion. Does the Foundation own that or was it converted to cash?
A The Foundation currently owns it. The

property is currently listed for sale.
Q What kind of property is that? Is it developed, undeveloped?
A Undeveloped land. And the dollar figure reflected there is based on a bona fide appraisal.
Q Okay. Now, the Foundation made a payment to Union Pacific in closing this transaction of some $350,000 or thereabouts?
A It was in two separate payments --
Q Well --
A -- totaling 350.
Q When I went through the documents this morning, I saw a letter in which -- and I can't recall if it was a letter from Mr. McFarland to Union Pacific or from somebody from Union Pacific back to you or him --
MR. MICKLEWRIGHT: Counsel, can I cut you off? Mr. Burkett is not subject to the confidentiality agreement, so if we're going to discuss documents subject to the confidentiality agreement, I am going to ask he be excused during that period of time. She's a party.
MR. ALLEN: Go ahead.
(Mr. Burkett leaves deposition.)
MR. ALLEN: Let me ask you this, BJ, because I don't practice municipal law. Do you have any disclosure obligations that you know of with regard to confidential

information that you would be obliged to disclose either to your trustees or anyone that it would be more comfortable for you if you're out of the room, too?
MAYOR MYERS: Let me think for a minute.
MR. ALLEN: Okay. I just can't advise you on that. I'm special counsel for the town. I don't know.
MAYOR MYERS: Obliged? Not that I would have to disclose, but I think I'd be more comfortable if I weren't a party to it.
MR. ALLEN: Okay. Great. Why don't you step out, too?
MAYOR MYERS: Okay.
(Mayor Myers leaves deposition.)
MR. ALLEN: Okay. Now, the record should reflect that Mr. Burkett and Mayor Myers are no longer in the room.
Q (By Mr. Allen) I believe my question went to the payments that were made to Union Pacific which would have been -- what? Roughly May of 2000?
A No. The first payment that went to Union Pacific was in --
Q That's right. You paid them earlier than that. They were, in effect, your earnest money on the purchase?

A It was an earnest deposit of a $100,000 that was paid.
Q Well, sometime prior to May of 2000, correct?
A It seems like it was August of '99 or October of '99 somewhere.
Q Then what? Another payment of about 250,000?
A Correct.
Q What was the source of those payments? Where did that money come from?
A The initial $100,000 deposit came from me.
Q Those were your own funds?
A Uh-huh.
Q Did you loan it to the Foundation?
A Yes.
Q Is there a note from the Foundation back to you for that money?
A There is.
Q And the other 250,000, what was the source of that money?
A Outside donation.
Q Who was the donor?
MR. MICKLEWRIGHT: It's subject to confidentiality, so if you want to --

A Sam Furukawa.
Q (By Mr. Allen) Who is he? Someone here in Durango, or who is Mr. Furukawa?
A He is a Japanese businessman that loves railroads.
Q Is he in the United States?
A Part of the time.
Q Japanese citizen, I take it?
A He is.
Q Has he made any further pledges to you or communicated anything further to you about money he might donate?
A He has.
Q Please describe the nature of what he may be contributing.
A This is all hypothetical because it's all based on conversations over the telephone, but he has made a verbal pledge of a million dollars. Whether or not he'll come through with that, I don't know.
Q Has he said when he would give you that money?
A No.
Q By "you," I mean the Foundation.
A Not at this time.
Q If we wanted to contact him, how would we do

that?

MR. MICKLEWRIGHT: Subject to the confidentiality order.

A See, I have a confidentiality agreement with him. It's to nondisclose.

MR. ALLEN: So we won't contact him without filing a motion with the court saying there is an individual whom we wish to contact — and I guess we'll seal the document that identifies him and then see whether or not Judge Shaffer or Judge Babcock will let us do it.

Now, subject to that agreement — and this will need to be separately transcribed or blocked out in some way and sealed.

(Following record is confidential:)

Q (By Mr. Allen) Okay. If I wanted to contact him, how would I do that?
A Sam is Microsoft of Tokyo. He is on the Board of Directors of Microsoft.
Q On the Board of Directors of Microsoft Corporation, the corporation that is listed on the —
A Yes.
Q — on the NASDAQ?
A Yes. Bill Gates, Paul Allen, Sam.
Q How recently have you talked with him or had other communications, written or oral, whatever, with him about such a donation?
MR. MICKLEWRIGHT: Objection to relevance. If you can, answer the question.
A I haven't spoken to Sam in some time, but I'll be seeing him this fall.
Q (By Mr. Allen) By "some time," are we talking about a couple days, a couple weeks, months?
A Months. He is, to say the absolutely very least, a busy man.
Q I presume one could contact Microsoft in Seattle and they would know how to find him?
A I would think so.
Q When you communicate with him, is he generally in the states or in Japan?

A I e-mail him.
Q Do you know his e-mail address from memory?
A No.
Q Is it an e-mail address that ends at Microsoft.com?
A It used to be. It's not anymore. It's long and different.
(End of sealed, confidential record.)

MR. ALLEN: Off the record a moment.
(Discussion off record.)
Q (By Mr. Allen) You've identified Mr. Furukawa. I'd like you to describe anyone or any other entity with whom you have had communication over the -- let's say since January 1, 2001, this year, relative to potential gifts, donations or other contributions to the Foundation of a substantial character. I'm not talking about people who, you know, buy a railroad tie for $90. I'm talking about major money. Let's say $10,000 and above.
Have there been any -- other than what you referred to with Mr. Furukawa, have there been, during calendar 2001, any other communications with any other persons or entities anywhere relative to contributions of $10,000 or more this year?
MR. MICKLEWRIGHT: Objection.
A Sorry. I talk to people all the time. Now, whether or not we can decipher who's real and who isn't, we don't know until we get into further dialogue and try to firm something up.
Q (By Mr. Allen) Has anyone written you a document, letter, e-mail, memo, this year, calendar 2001, indicating a possibility of a contribution from that person or entity or someone they represent of $10,000 or more?

MR. MICKLEWRIGHT: Objection. Asked and answered and relevance. But if you can, answer the question.
A I don't have that information at my fingertips.
Q (By Mr. Allen) I would think if you're sitting here having to either make a payment to Union Pacific of $137,000 or go back to them, once again, and say, "I can't pay it, you need to roll it," and needing significant amounts of money to lay track, rehabilitate track, buy equipment, all of that, hire people, that, in Dr. Johnson's terms, your mind must be wonderfully concentrated on who might be coming up with that money for you. Isn't that fair to say?
MR. MICKLEWRIGHT: Objection. Argumentative.
MR. ALLEN: I don't think it's argumentative.
MR. MICKLEWRIGHT: You're asking him to put himself --
MR. ALLEN: I'm asking him about his own state of mind. He can testify to his own state of mind.
MR. MICKLEWRIGHT: No. You're saying, if it was your state of mind, this is what you'd be concerned about?

MR. ALLEN: No. I'm saying I would think his state of mind would be wonderfully concentrated on sources of money to come up with the dough to get this thing up and rolling.
MR. MICKLEWRIGHT: Is that the question? If the question is, "Are you concerned about making payment" --
MR. ALLEN: Okay. I will adopt that.
Q (By Mr. Allen) Are you concerned about making payment?
A Not at this moment.
Q Do you have identified sources from which you will be able to make payments?
A Potentially.
Q What are they?
MR. MICKLEWRIGHT: Objection. I'll instruct you not to answer that question.
MR. ALLEN: We just had a confidentiality agreement. I can't even talk to these people without asking the permission of the court to do so.
MR. MICKLEWRIGHT: I don't want you talking to these people.
MR. ALLEN: Fine. I'll make that pitch to the judge.
MR. MICKLEWRIGHT: Let me say this again.

This appears to be an attack on the Offer of Financial Assistance. Even if you were able to make an attack on the Offer of Financial Assistance, as you seem to be inclined to do in the pending litigation, it seems to exceed the scope of the court's jurisdiction. You need to file a petition with the STB. You can't ask this judge to exercise jurisdiction when your client has lost its appeal rights from the Offer of Financial Assistance, and we're not going to assist them in this litigation in trying to conduct discovery to determine whether or not there's some new evidence by which they can open an attack on the Offer of Financial Assistance, so --
MR. ALLEN: I'd like to move for a summary judgment in this case that Creede's zoning applies because there is no competent evidence within the -- no competent evidence within the meaning of the Celotex, C-E-L-O-T-E-X, Case to support an inference that there will ever be railroad service going past Section 36. And that means that I'm entitled to find out whether or not there are financial -- the record as it sits right now, Ray, is, there is no rail service, and there is no evidence of any ability to create rail service.
That is the record as it is right now, and that is the nature of the question. I just want to close the door. I want to find out if there is a source of substantial

revenue in order to get from where they are right now, which is basically moribund to actually operating freight rail service within the city of Creede.

MR. MICKLEWRIGHT: I don't think, given the scope of this litigation, and the fact that your client has lost its appeal rights to the STB --

MR. ALLEN: I'm not going to debate the appeal rights to the STB. I wasn't here then. As far as I know, Creede was not a party. Nobody is trying to reopen what the STB did, other than through Judge Babcock. Okay. It's solely in this litigation. I have no intention of filing a petition to reopen. This is not an expedition. You guys raised the STB. We didn't. We had a nice simple Mineral County zoning case, and that's all we had.

We just wanted to be sure that nobody was going to start putting commercial development on Section 36 in Creede. That's all we wanted to do. That there weren't going to be any bed and breakfasts or motels or anything else built in order to generate a revenue stream off of this couple of acres of ground. That's what our lawsuit was about. You're the guys who turned it into something that you wanted sent to the STB. We didn't.

MR. MICKLEWRIGHT: No, that's not correct. Let me just make my record. In the scheduling order that was submitted to the court, which I think controls the

litigation with respect to the scope of the issues, one of the things that you have asserted is that -- and let me just make sure I get the language absolutely correct.

Plaintiff claims its 1972 residential zoning is applicable to all of the former Denver & Rio Grande Western Railroad right-of-way in that part of the city of Creede known as South Creede, except for the area occupied by the railroad tracks themselves and a side clearance area extending 12.5 feet to either sides of the center line of the tracks; thus, Creede's claim is that except for a 25-foot wide strip on which the tracks are centered, all of the Denver Rio Grande Western Railroad right-of-way in South Creede is subject to Creede's residential zoning. That's the issue that you put in your complaint.

MR. ALLEN: Exactly. That's my point. And if I can establish that there is never going to be rail service, then I can absolutely get a summary judgment on that issue. There isn't even anything for the STB to determine. So, you're the guys who said don't remand this case to the state court because there are STB issues in it.

MR. MICKLEWRIGHT: Governing that has to be -- what you are asserting is a direct attack on the Offer of Financial Assistance.

MR. ALLEN: No, it isn't, but I don't want to debate that. I just want to find out if there is

somebody out there who's going to pony up a million dollars so we can get operating, and, if so, who it is.

MR. MICKLEWRIGHT: I don't think he has to answer these questions, and I'm going to instruct him not to.

MR. ALLEN: I could at least understand the position that I wouldn't go into his personal assets, even though I think I am entitled to since he's a guarantor of the Offer of Financial Assistance. And now you're saying that we can't find out what the Foundation has either.

MR. MICKLEWRIGHT: No. What you're asking is what the Foundation might at some point in time get. I have allowed you to ask questions about how the Foundation arrived at the assets that it has disclosed to the public, but I'm not going to let you have access, at this point in time, without a court order that says you can find out any place where there might be a source of revenue so you can interfere with it. I'm not going to let that happen.

MR. ALLEN: I have no intention of that.

MR. MICKLEWRIGHT: I don't mean you personally. This is a bitter piece of litigation.

MR. ALLEN: No, it's not bitter. Shoot.

MR. MICKLEWRIGHT: Well, as an outsider, I read those newspaper articles and the letters in my client's files that you've had access to, and they sure

sound to me that it's bitter and personal.

MR. ALLEN: I don't read the newspapers.

MR. MICKLEWRIGHT: I understand that, but I'm saying that with respect to the people from the community, it is an emotional issue, not a rational issue. We're fighting about something --

MR. ALLEN: I'm trying to get at a revenue stream that looks like it might reasonably give him enough money, him, the Foundation, to get operational. And, first of all, what I want to touch on is donors or prospective donors.

MR. MICKLEWRIGHT: Okay. I'm not going to let you inquire into prospective donors. I'm not.

MR. ALLEN: You understand that if you want to file something in this proceeding with the STB that says, "Oh, we got donors," I'm going to ask for preclusion on the grounds that you shielded it from inquiry?

MR. MICKLEWRIGHT: I don't think this has anything to do with donors or financial reports. This case has everything to do with whether or not, if there were a operational railroad, would the city of Creede's residential zoning ordinances preempt the federal laws regarding the operation of the railroad.

MR. ALLEN: You can claim there is an operational railroad based on having the OFA rights,

regardless of whether you're driving trains up and down?
MR. MICKLEWRIGHT: No. The issue is, is the zoning ordinance of -- the residential zoning ordinance for the city of Creede applicable to the railroad right-of-way. That seems to me to be something that the STB can answer without any hesitation and is in a far better position to answer that question than the judge, although I think the judge could easily answer the question, but I think it's more appropriate under the doctrine of primary jurisdiction for the STB to make that determination.
MR. ALLEN: But if our factual record is that there hasn't been a train on it since 1985 and within the city of Creede, there hasn't been a train on it since 1972 and there is no financial ability to put a train on it hauling freight, then I think I'm entitled to a summary judgment in this litigation.
MR. MICKLEWRIGHT: On what?
MR. ALLEN: That Creede's residential zoning is applicable to this strip of land. We're talking about Section 36 land, not used -- land not historically used for railroad purposes.
MR. MICKLEWRIGHT: Okay.
MR. ALLEN: Okay. And, therefore, I'm entitled to inquire into whether there is any probability within the -- you know, what "Celotex" talks about, you

can't defeat summary judgment, Ray, with a conclusory allegation that somebody is going to give us a million dollars. You got to come in and say exactly how you're going to do it.
MR. MICKLEWRIGHT: No matter how you couch it, what you're talking about is an attack on the Offer of Financial Assistance.
If you want to bring -- if you want to join in a Motion for Summary Judgment that says if and when -- well, it would look something like this: Is the railroad right-of-way subject to the city of Creede's zoning ordinances, residential zoning ordinances, or are those zoning ordinances preempted by federal law? That is a no-brainer. The answer to that is self-evident.
MR. ALLEN: I don't know the answer to that. What is the answer?
MR. MICKLEWRIGHT: The answer to that is that the city of Creede's residential zoning ordinances can be enforced to the extent that they do not interfere with the preemption of federal law.
MR. ALLEN: Right. Okay. I agree with that. Now, what I want to find out is whether or not there is ever going to be any railroad operation there or whether or not we can just say globally that Creede's residential zoning is applicable because there isn't going to be any

railroad operation.
MR. MICKLEWRIGHT: Again, I think that goes to the issue of the Offer of Financial Assistance.
MR. ALLEN: Well, okay, fine.
MR. MICKLEWRIGHT: If my client carries out his obligations under the Offer of Financial Assistance, there's going to be a railroad.
MR. ALLEN: Okay. Are you going to assert a similar position with regard to the people he's talked with at Union Pacific so I have to keep Burkett and Mayor Myers out of the room?
MR. MICKLEWRIGHT: Yes.
MR. ALLEN: Let me tell them that's where I'm going next, so they will understand that they're going to be cleaning their heels for a while.
(Recess taken.)
MR. ALLEN: Okay. I'm going to ask one final question for the record so that you have an opportunity to make your pitch, so I'm sure that I've exhausted every possibility.
Q (By Mr. Allen) Mr. Shank, at this time, you cannot or will not identify any person, entity or legal personality of any kind, corporation, representative, who or which is a prospect to contribute or give or make available to the Foundation this year anything having a

value of $10,000 or more. Is that correct?
MR. MICKLEWRIGHT: I'm going to object to that question. I'll instruct my client not to answer that question.
Q (By Mr. Allen) Okay. Now, moving on, when we inspected files at your offices in Durango this morning, those are the only offices of the Foundation?
A Yes.
Q Is that the only place the Foundation has a physical presence?
A No. The Foundation clearly has a physical presence on the railroad.
Q Okay. I understand it's got that right-of-way. Is there anywhere that the Foundation actually has an improved structure? Are there any warehouses or buildings or equipment yards or anything of that nature?
A Well, we do have a significant amount of equipment located in a number of areas, places. Some has been donated and yet to be moved, and some is a work-in-progress.
Q Can you hit the high spots for a couple minutes and, say, "We got tracks stockpiled here; ties here;" this locomotive we already talked about down in Brighton, and etc.?

A Perhaps it would be appropriate to look at some of the equipment. This equipment, maintenance of way motorcar, is not owned by the Foundation, but it is made available for use, unlimited use.
Q Who owns it?
A Richard Cutter.
Q How much is it worth about?
A What's it worth?
Q Uh-huh. If I had to go out and buy one tomorrow?
A In this condition, probably at least 15,000.
Q Okay.
A This is a Foundation owned motorcar. It's been restored, fully operational.
Q The Foundation owns it?
A Yes.
Q Where is it located physically?
A Currently, it resides at the Cutter residence.
Q Is that along the right-of-way?
A This is on the Creede Branch right-of-way.
MR. ALLEN: Okay. Can we at some point get copies of these?
MR. MICKLEWRIGHT: Yes.
A This is a rail grinder for grinding inside

surfaces of the rail.
Q (By Mr. Allen) Okay. What is its approximate worth in the free market situation?
A You know, I don't know what it's worth on the open market.
Q About $10,000?
A No.
Q Less?
A Less.
Q Okay.
A This is a rail anchor machine. Also a hydraulic platform, fully operational.
Q That is what you described in your last deposition as being potentially worth $90,000, but you got it for a dollar?
A No. Not even close. We got it for $90 and probably worth -- purchased new, I would guess it's somewhere between 40 to 60,000.
Q So you got it for a nominal payment. Where is it located?
A The Foundation didn't purchase it. It was purchased by the Cutters for use by the Foundation. It is at their residence.
Q Their residence is in Mineral County?
A No. Durango.

Q Okay. So that piece of equipment is presently located in Durango?
A Yes.
Q How would one get it over there, put it on a flatbed truck and haul it?
A If you'll notice, in this picture, it is on a flatbed truck, and it currently resides on the truck ready for movement.
Q Has it ever been up there to Mineral County?
A I'm sure it has.
Q Has it been up there for use by the Foundation?
A Not yet. We're not installing anchors at this time. Flat car. Goes behind the motorcar. Diesel locomotive currently being negotiated for.
Q Where is that locomotive?
A Gosh.
Q Is that the one in Brighton?
A No. This is similar to the one in Brighton that we already own.
Q Okay. What would you say its worth is?
A Twenty-five thousand.
Q Is it operational right now?
A It is.
Q Where is it located?

A I'm sorry. We've looked at so many. I'm not sure if this one is in Kansas, Texas, or back east. I believe this is Kansas.
MR. ALLEN: Can you hold the photograph up. Doesn't look like eastern US vegetation. Not impossible, but --
MR. MICKLEWRIGHT: Just for the record, it's Kansas.
A Hey, first choice. Here is some of our surplus switch stands.
Q (By Mr. Allen) What are they worth?
A Well, depending upon the item. Some of these have great historic value which places a far higher value than simply a stamped steel. This is a cast iron switch stand. Cast on it for hanging the switch lantern on the top. Very old "D&RG RR" cast on it. They carry a much greater value than the newer stamp steel.
Q Let's take the generic one without historic value. What are we talking about?
A A couple -- 300 bucks, 500 bucks.
Q One with historic value, a few thousand?
A Somewhere in that vicinity.
Q Okay.
A These are rail drills. These are pneumatic jacks.

Q Give me an aggregate value of everything there.
A Oh, drills are about $2500 a piece.
Q You've got -- what? Three or four of them there?
A I believe that's what we have. These jacks are quite expensive. I'm sorry. I don't know what their exact worth is. I saw two identical units being utilized in the Rio Grande shops in Denver.
Q Okay. Ten or twenty thousand for the aggregate?
A If that. Yeah. On the aggregate, yes.
Q Can you angle that slightly differently? I'm getting a glare.
A This is the depot in Creede prior to the removal of what they used to call the parlor. This area has been cleaned out. The depot has been -- this is just giving you some progress here.
Q Is it the Foundation's position that the Foundation owns the depot in Creede?
A They do not. That's owned by Mineral County. We really needn't discuss this on record.
Q Okay.
A This is how the right-of-way looked prior to cleanup going through Masonic Park. As you can see, there

were 20 foot high Aspen trees between. This has all been cleared out.
Q Those are trees with probably a six-inch caliper?
A About that. This is an area just below Creede in what's known as the Willow Creek Reclamation Area.
Q That's where you got a letter from the court saying you didn't need a 404 improvement unless you did something drastic?
A Yes. The city of Creede made a filing to the Corps of Engineers filing a complaint, etc., etc. This is what we did. We simply cleared off the surfaces of the rails so we could navigate. The Corps came down and wasted nine hours of taxpayer money and said we did nothing wrong.
MR. ALLEN: If they hadn't been doing that, they would have been out harassing somebody else.
Q (By Mr. Allen) That looks like Creede. Is it Creede?
A That's Creede. This is our right-of-way coming up through Section 25. As you can see, the city parks their vehicles on it.
Q Okay.
A This is the --
Q That's the event center?

A Yes. This is the quote, unquote, event center.
Q Okay.
A Downtown Creede.
Q What I want -- I'd like you to skip over things that don't show something that you're either occupying with a building or show some equipment. I mean --
A Okay. This has all been cleared. This is a landslide that was cleared. Rock slides were cleared. Equipment that was working on the right-of-way. More landslides. Maintenance vehicle. Auto maintenance vehicle here. Clearing fallen trees. Removing rock. Foundation equipment here or Cutter equipment here as well.
Q Okay.
A Installation of new ties.
Q Okay.
A We hadn't gotten into this, but we've been replacing ties, welding rail, clearing brush, moving rock slides.
Q Has there ever been any federal inspection of this since you've been involved?
A No, there's not been a federal inspection by the FRA, Federal Railroad Administration inspection. We have had an IRS auditor out on the line.

Q What was the reason for that?
A We just went through a complete audit of the files for the Foundation last week.
Q Why? By the IRS?
A By the IRS, which we came through just fine.
Q Did they issue a document to you saying you came through it just fine?
A It will be forthcoming because when she left, everything was crossed off her list, so --
Q Did you request the audit?
A No, we did not.
Q I've quit requesting audits also.
A Good move. Welding equipment. Fire suppression.
Q Is that welding equipment something that you previously identified?
A I believe so.
Q Okay.
A Digging out this area. New tie just about to be installed.
Q Right. We talked about ties the last time.
A This is a picture of the Colorado Department of Transportation with their one and only rototill machine brought down from Denver to clear the crossings.
Q Why was that done?

A Because there are crossing agreements between the railroad and the state of Colorado, and these crossings were all paved over so we could not navigate through them. They were blocking the federally authorized railroad.
Q And so you couldn't haul your little --
A We couldn't bring maintenance equipment through to rehabilitate the line, to open it up for interstate freight rail service.
Q Got you.
A This is the additional work being done by CDOT crews.
Q It's a photograph of a John Deere loader painted orange.
A Bridge and Wagon Wheel Gap.
Q Okay.
A The line is now open for maintenance equipment, maintenance crews, all the way from South Fork.
Q Are you going to come to any photographs remaining that we haven't already seen the equipment portrayed?
A I don't believe so.
Q Do you have an equipment yard? Does the Foundation have an equipment yard anymore?
A We have an area designated in South Fork

that we will utilize as our railroad yard.
Q You have rail stored there?
A There is rail in South Fork. We have more rail sitting up at the Rocky Mountain Arsenal.
Q What color value of rail inventory are you holding, you the Foundation?
A I would say somewhere in the vicinity of 20 to $30,000 in rail.
Q And most of that is at the Rocky Mountain Arsenal?
A Significant amount of rail up there. Significant amount of rail along the line laid down at various places or places for rehabilitation.
Q Do you have ties stored somewhere?
A We have ties in different piles along the line, in critical areas. We have acquired a steel building, 110-by-55-foot steel building.
Q Where is the building?
A The building is currently in South Fork. It's going to be relocated within the railroad right-of-way in South Fork for shop and service facilities.
Q It's 110-by-50?
A It's 110-by-55, I think is what it is.
Q Does the Foundation own that building now?
A The Foundation will own that building. It's

currently owned by me.
Q Is there any debt on that, or is that something you have free and clear and you can --
A No debt on it.
Q Is the building erected now?
A It's a bolt-together steel building currently erected and will be dismantled and relocated. We own another steel building over there; and I apologize, I have forgotten the size of that one. It's smaller. It will be utilized for shop office maintenance equipment.
Q It's also in South Fork?
A It is.
Q Who owns it right now?
A I do.
Q Okay. So right now you own both of these buildings, but you're going to donate them to the Foundation?
A They're going to the Foundation.
Q Does the Foundation pay you anything?
A No.
Q What do you live on?
A I have income from other sources?
MR. MICKLEWRIGHT: Objection to relevance.
A Income from other sources.

Q (By Mr. Allen) Okay. Does that cover -- what we've just gone through covers all of the equipment yards, equipment buildings, etc., that are either owned by or used by the Foundation?
A There's more equipment, more parts, pieces, artifacts.
Q I don't want trivia. I want major components. Do you want to confer with Mr. Cutter for a moment?
A I'm just trying to think as far as major components. Again, major components are a work-in-progress. There is a lot of things we are working on acquiring at this time. So to say it is currently owned, meaning the transaction consummated, so, therefore, ownership is in the Foundation at this moment, no. Suffice it to say, that's about where we are at this moment.
Q Does the Foundation have an insurance policy on this whole thing?
A Yes.
Q Is a copy of that policy in the file cabinets we went through this morning?
A I would think it is.
Q We didn't see any insurance policies.
A It should have been in there.
MR. ALLEN: Could we be furnished with this

insurance policy whether we've tabbed it or not?
MR. MICKLEWRIGHT: I don't know yet. I would think there shouldn't be any problem. I won't commit to it until I've had an opportunity to review it myself.
MR. ALLEN: I take it, Ray, you have not seen the insurance policy?
MR. MICKLEWRIGHT: No.
Q (By Mr. Allen) Do you know what kind — do you have public liability as one of the components of that?
A Yes.
Q Can you tell me who the carrier is?
A It was written through — let's see. One second. It's four different names. Hamon, Demill, Miller.
Q They're the brokers?
A Yes.
Q Do you know who the company is, the carrier?
A We buy it, put it in the drawer, and we forget the name of who the company is. It's one of the major companies. It's a policy that was written through the National Railway Historical Society.
Q Have they imposed any covenants or caveats or requirements on you as to safety procedures or access policies or anything of that nature as a condition of the insurance?
A Only we have had discussions regarding

potential liability for a property that is in Creede.
Q Is there a policy provision that has been called to your attention or that you can recall or you read or seen or heard about that requires any particular procedure for enforcing; for example, no trespassing requirements or other safety requirements?
A Not at this time, but I want to say this: The insurance gets written for a specific use, for a specific purpose, and it's based on where you're at at a certain point in time with the rehabilitation. As this project moves forward, we will increase our insurance coverage to include additional things. Our agent said there's no point in overinsuring the company for a specific function. As the functions broaden and as the rehabilitation projects gets into full swing, obviously we're going to enhance our insurance and have additional coverage.
Q Was there ever a point, at any point over the last year or two, where the insurance company had said you've got to go out and make sure nobody gets on this right-of-way?
A I don't recall. I've had discussions numerous times with our agent.
Q But has anybody ever called your attention to a documentary provision that says that, if you do not

have measures, for example, to enforce no trespassing, that you would not have coverage for someone that comes on the property and gets injured?
A I don't recall if I had that dialogue at this moment. We may have.
Q I'm not talking about a dialogue. I'm talking about a document.
A I don't recall.
Q Okay. Union Pacific. With whom have you had dealings with at Union Pacific over the past two years? By "dealings," I mean only substantial dealings. I don't mean incidental calls or contacts. I don't mean contacts with secretaries or paralegals. I mean officers or executives of the company with whom you've had dealings.
MR. MICKLEWRIGHT: I object to the scope of the question.
MR. ALLEN: I'll try to narrow it.
Q (By Mr. Allen) Have you had dealings with Gary B. Collins?
A Yes.
Q What has been the nature of your dealings with Mr. Collins?
A Mr. Collins is senior manager of the real estate department at Union Pacific Corporate in Omaha.
Q And is he the person with whom you have

dealings when you need to postpone or defer payment dates on the notes to Union Pacific?
A He is one of several.
Q Who are the others?
A Denny Brown. Denny is the director of real estate for Union Pacific Corporate.
Q Is he senior to Collins or junior to Collins?
A Senior.
Q And he's also in Omaha?
A Yes.
Q He's somebody that would be in the loop on the Union Pacific side with regard to postponing a payment or deferring a payment?
A Yes.
Q Have you ever talked with either Mr. Collins or Mr. Brown about Mr. Furukawa?
A I don't recall.
Q Is it possible?
A I don't recall.
Q What representations have been made to Mr. Collins and Mr. Brown regarding prospective sources of income or funding for the Foundation?
A What comments have been made to him? Is that what your question was?

Q Uh-huh. What representations have you said to them, "We need to have this deferred, for example, because I know I've got a guy who's going to give us a lot of money by the end of the year" or something to that effect?

MR. MICKLEWRIGHT: Have you used those words?

A I don't recall specific verbiage in our discussions. I will say this: The Union Pacific Railroad has bent over backwards to be accommodating to our Foundation. They believe in us. They are hoping for our success, and they have worked with us in granting extensions when necessary because they are sympathetic to the plight and distress that we suffer as a result of this lawsuit.

Q (By Mr. Allen) Let's get the other names. Have you had dealings with Don Hartman at Union Pacific?

A Don Hartman?

Q Uh-huh. His name appears on some of the correspondence I looked at this morning.

A You're sure it's Don?

Q Might not be.

A Is he up in Wyoming?

Q I believe so.

A I've talked to Mr. Hartman.

Q How about Bob Opal?

A I talk to Bob often. As do you.

Q I've talked to him twice in my life, had lunch with him once. Nice fellow. Got an office full of railroading stuff.

A Very nice.

Q Are there other major personalities at Union Pacific other than Collins, Hartman, Opal and Brown with whom you've had significant dealings at Union Pacific?

MR. MICKLEWRIGHT: Objection to foundation.

A I have talked to so many people at the Union Pacific. Mr. Urich. I think it's Urich or Ulrich, and I forget which it is. I believe he is effectively the head of the real estate department. We have spoken. Christine Smith in the legal department. Joe Anthover in the legal department. Joe is no longer there.

Q (By Mr. Allen) What has been said in your communications by you and/or by Union Pacific with regard to your acquisition and further rights beyond Derrick?

A Further rights beyond Derrick as in heading east, west, what?

Q Well, as I understand it, Union Pacific no longer operates regular train service to Derrick. Is that correct?

A That is correct.

Q So even if you had the ability to haul freight from say Creede down to Derrick, there would need to be some means of getting the car with freight beyond Derrick to get onto a Union Pacific train. Is that correct?

MR. MICKLEWRIGHT: Objection. Assumes facts not in evidence.

MR. ALLEN: Come on, Ray. It's late. I'm tired.

MR. MICKLEWRIGHT: I'm tired, too.

MR. ALLEN: Okay, but it's a perfectly proper question.

MR. MICKLEWRIGHT: What does this have to do with whether or not Creede's zoning ordinances apply to the railroad right-of-way in the city of Creede?

MR. ALLEN: I don't want to try to articulate that. We had a war with Judge Shaffer that I won and you lost over whether or not I can talk about their ability to operate this railroad, meaning he specifically said in the last deposition I could inquire into what would be involved to get it operational. And if you can't haul a stupid rail car past Derrick because all you do at Derrick is have to park it because there's no way, no rights to operate beyond that, and Union Pacific doesn't want to come

up and pick it up, then clearly to get to interstate transportation of freight by rail, it's got to get past Derrick, Colorado, somehow, right?

MR. MICKLEWRIGHT: Well, that's your position.

MR. ALLEN: Okay. I just want to ask if he's had -- I don't know if you remember. We were down in court. You took the principal position he wouldn't talk about Union Pacific on June 21st, and I had a newspaper clipping that was read to me subsequently that, had I seen it earlier, I'd have said, "Hey, he's giving newspaper interviews about getting operating rights to Monte Vista" or wherever, Del Norte.

So I want to ask questions about what's been said by the Foundation and by Union Pacific relative to whether or not there are going to be operating rights, sale of rights-of-way, abandonment and OFA, whatever, to get from the eastern terminus of the Foundation at Derrick to some point where Union Pacific is still operating trains.

MR. MICKLEWRIGHT: So, what's the question?

Q (By Mr. Allen) The question is, what is the nature of the communications that have gone back and forth between the Foundation and Union Pacific relative to connecting any traffic that comes off your line to Union Pacific past Derrick, meaning east of Derrick?

A I have had dialogue with Union Pacific and I have had dialogue with Gary Collins, Denny Brown, Bob Opal, a number of people, regarding the potentiality of acquiring additional right-of-way in an eastward direction from Derrick. I have stressed the importance of maintaining our main line connection.

Q And what is Union Pacific's stated position to you in that regard?

A They are very much aware of the fact that we would like to acquire additional right-of-way.

Q Are they willing to sell it to you?

A They may be at some point in time.

Q Has there been any documentation of any of this communication?

A No. It's all been verbal at this point.

Q Verbal could be either written or oral. Has there been any written communication about operating either overhead traffic on the Union Pacific line or sale of their right-of-way or some other rearrangement regarding transportation of your stuff beyond eastward past Derrick?

A There may have been written communication. I don't remember if I put it in writing or not. I talked to them a number or times. We are at a position right now where they are currently doing a wait-and-see with regard to this lawsuit and the situation, and Union Pacific is

comfortable in negotiating with us. They said they would certainly entertain that, but they wanted to identify its net liquidation value.

Q Have they communicated anything to you about a net liquidation value?

A No, not at this time.

Q What is the western-most point that they now serve going toward Derrick?

A South Fork.

Q No. Where they have an actual operational train from.

A They're bringing tank cars in and out of the valley still. These are dust-suppression carrying flat cars or tank cars, and they brought them into South Fork through the course of the spring, winter.

Q When did the sawmill close?

A The sawmill formally closed December of last year.

Q Does it still have sort of cleanup and, you know, close-down things going on there?

A There is still remediation being done.

Q Does that have implication of some rail service in or out, to haul things in or out?

A Not that I've seen.

Q If there have been any written communication

either by the Foundation to Union Pacific or by Union Pacific to the Foundation relative to service between South Fork and Monte Vista or Del Norte, would copies of such communication have been in the files that we went through this morning?

A I would assume so. They should be there unless I didn't keep a copy of them.

Q Were the two lateral file drawers, which were about 30 to 36 inches long that Mayor Myers and I inspected this morning, the only files regularly maintained by the Foundation?

A Yes. They were present in my office. Well, maybe they're not in my office. They may be in my truck. I have the maps of the railroad alignment from Derrick to Monte Vista, and they were sent to me by the Union Pacific when we commenced dialogue.

Q How long has this dialogue been going on about your operating past Derrick?

A Several months.

Q Has anyone said, "We can work that out for you," or words to that effect?

A I don't know if I'd use terminology to that effect, but given the good working relationship shared between the Foundation and the Union Pacific, I think that in time we could certainly reach a harmonious agreement.

Q I take it, the Foundation does not have a file anywhere that collects in one place all of its corporation documents, such as articles, bylaws, corporate resolutions, corporate minutes?

A I know the bylaws and articles and the addendum and everything was in one file. I saw BJ go through that or Mayor Myers go through that and it was in her lap. If they were placed back in my drawer in a different location, then I had no control of that.

Q I didn't see anywhere in the files I looked at, a ledger or journal or some bookkeeping record of all of the financial transactions of the Foundation. Is there such a record?

A Yes. It's there in the office.

Q Was it in the file drawer?

A It should have been. That's prepared by our bookkeeping service, and it was brought over there in the office for the IRS audit. It was completely gone through.

MR. ALLEN: Ray, I want the same position with regard to the ledger and journals that we have on the insurance policy, which is, whether we put stickies on them or not, we want to receive copies of them.

MR. MICKLEWRIGHT: I thought it was in the folder you looked at yesterday, but --

THE WITNESS: I could swear he had it in his

hand yesterday.

MR. ALLEN: I might have. In any event, let's take a moment while I digress on that. This morning for about two hours, Mayor Myers and I inspected two lateral file drawers which were made available to us from about 3:30 yesterday afternoon. I did not arrive in Durango until about 4:14 yesterday afternoon. We had discussion about where the deposition would take place. I took about a 20-minute look just in a general way to get a sense of what the inspection task was going to involve.

I did not actually identify any documents yesterday for copying pursuant to an agreement Mr. Micklewright and I, made between ourselves. By conversation and colloquy between us, we agreed we would go through the files this morning, which we did, and we used two colors of stickies, 3-M Post-It notes, yellow ones to denote things we wanted copied and pink ones to denote things that we wanted copied and brought to this deposition.

My understanding is that the Foundation will go about making copies of the items we identified and furnish them to us and will charge us some rate which, hopefully, is not more than 25 cents a page for the cost of copying. Does that comport with your understanding, Ray?

MR. MICKLEWRIGHT: Well, I don't know how much we're going to charge for copying or costs associated

with that, but I know it will be commensurate with the correspondence that we got from the city that said how much they were going to charge us to make documents.

MR. ALLEN: Okay. So we'll have some sort of symmetry about copying documents. And at some point in the next few days to a week or so, we'll get those copies.

MR. MICKLEWRIGHT: Let's be clear. With respect to the documents that you requested be produced to you immediately, those documents were copied and made available to you this afternoon prior to the deposition.

MR. ALLEN: Right, and I believe we received them.

Okay. In addition, in case we missed it, our request is that we be given a copy of the insurance policy. We may have seen it and tabbed it. I just don't know. That was just described by Mr. Shank. Also, that we get a copy of the Foundation accounting records, meaning the ledgers and the journals, journal entries, which he has just described in his testimony in the last couple of minutes.

When we conclude today, we probably want to do a wrapup in case there are any other documents that occur to us, but that's where we are right now. I don't think I have anything else that's going to implicate confidentiality.

Oh, let me back up. With regard to the documents that we have requested be copied or have already been furnished to us, do I properly understand that all of those are subject to the Protective Order that we agreed upon?

MR. MICKLEWRIGHT: Yes.

MR. ALLEN: With the exception of, say, where they are public record in the STB or something like that?

MR. MICKLEWRIGHT: That's correct.

MR. ALLEN: Fine. If something is a court pleading or STB file document, we don't have to preserve any confidentiality regarding that.

MR. MICKLEWRIGHT: Unless they themselves are subject to some confidentiality order.

MR. ALLEN: Independent of the order that we have in this case.

MR. MICKLEWRIGHT: That's correct.

Q (By Mr. Allen) Other than the people we have just gone over, Hartman, Opal, Brown, Collins, Joe — what's his last name?

A Anthover. Joe retired a year ago.

Q Is he an Omaha guy?

A He was.

Q I'm going to have some questions about Leslie Paisley.

A Parsley.

Q Parsley. Okay. I can't read my own handwriting. And Leslie Parsley is a woman or man?

A Woman.

Q Okay. As I understand it, she is involved or has been involved in an attempt at fund-raising with the Foundation. Is that correct? Grant applications?

A She was. She was briefly.

Q Is that area of communication something that you would want Mr. Burkett and Mayor Myers included in, or can we get them back in the room while I ask questions about them?

A I think exclusion is appropriate.

Q Okay. Was Ms. Parsley — and I saw an envelope that had an address in Denver, 4087 South Quebec. Is that where she now is?

A No. She moved away back east.

Q What role did she play?

A A very brief role. An individual that was trying to help the Foundation took it upon himself to engage her on our behalf, and she was utilized only briefly. It became apparent that she was not real astute at that profession, and her services were terminated.

Q And had personal problems as well?

A Big personal problems.

Q I saw something in there referencing something about bipolar disorder.
A It got to a situation between she and the person that recommended her. They just were at each other, and I distanced the whole bunch.
Q With what potential granting entities was she involved? I saw the Gates Foundation. Was she involved with him?
A No. I talked to the Gates Foundation.
Q With what potential granting organizations or entities was she involved in?
A If memory serves me correct, she and another gentleman had contacted the Freeman Foundation, I believe is the name. They're back East. I don't know this to be factual, but it was my understanding at the time that they said that the Freeman Foundation was well versed in fund-raising and grant monies for railroad usage.
Q Anybody else or any other entity?
A I think that's the only one that they submitted anything to. And it was such a ridiculous filing, that it was one of the reasons it was terminated.
Q If I want to inquire as to what other foundations or entities with which you've had communications or grant applications, is that something you want people included in?

A I would prefer them excluded.
Q Can you tell me what other entities or grant-making institutions or foundations have been the subject of communications from your foundation?
A I have spoken with the Boettcher Foundation. B-O-E-T-T-C-H-E-R. I believe it's two T's. The Ford Foundation, Microsoft Foundation, the Gates Foundation, Adolf Coors Foundation.
Q When you say Gates, you mean --
A Gates Tire and Rubber. It's the Gates Family Foundation, is what it's called.
Q Not the William and Melissa Gates Foundation?
A No. Although we have sent letters inquiring to Microsoft Corporate. National Trust for Historic Preservation. Let me think.
Q Have any of these responded with actual contribution funds to your foundation?
A No, but we have dialogue, and we're working in a different direction now. Where it became readily apparent that we were going about this in a manner that was not overly successful with these foundations, there is another course of direction which we will reapply to them.
Q What is the difference between how you were doing it and how you plan to do it?

A Where we were going after just a large general grant, we are now going at it in a more specific manner identified or earmarked for what could be a piece of equipment or materials for a specific job or function rather than going after general funds.
Q So now you're more targeted?
A More targeted. It was a learning curve.
Q What would you estimate to be the size of your office in Durango?
MR. MICKLEWRIGHT: Objection. Relevance.
A I believe that office is a 12-by-12.
Q (By Mr. Allen) So about 225 square feet, 250?
A 12-by-12 would be about 144 square feet.
Q Sorry. You're right.
A It's small.
MR. ALLEN: Okay. Okay. I want to take a break to go to the men's room, and then I want to talk about leasing in Creede. Does that have confidentiality implications? I don't think so. I saw all kinds of verse going back and forth. I realize that the documents are going to be confidential.
THE WITNESS: Each lease unto itself would be confidential.
MR. MICKLEWRIGHT: I think if we're going to

talk about documents that are confidential, I don't think these folks need to know about it. I think the Mayor does. I don't understand why she's excluded.
MR. ALLEN: She didn't want to be in.
MR. MICKLEWRIGHT: Who are you going to talk to if you can't talk to the Mayor?
MR. ALLEN: She was sensitive to her potential obligations under the Sunshine Law or open records or whatever. Okay. Let's take a break while I go to the men's room.
I'll get the Mayor back in, and I want to see what the potential revenue stream is and whether or not the leasing regime or real estate development regime on the right-of-way is potentially a major source of revenue and if anything has been done to actually get parcel by parcel metes and bounds, descriptions of the properties being leased. So that's where I'm going next.
(Recess taken.)
MR. ALLEN: We've been on a break for about ten minutes. It's now 2:35 p.m.
Q (By Mr. Allen) As I said before we took the break, to try to identify how you're going to get money to get operating and pay the Union Pacific --
A Is that why we took the break?
Q We took the break so I could go to the men's

room; and as I said before we took the break, what I want to go into now is potential revenue sources from leasing regime or development regime or whatever there might be on the right-of-way itself in the town of Creede. I don't care what you're going to do out of Creede. That's not part of our litigation.

So let me ask this: With how many different landowners or occupants of land on the right-of-way does the Foundation presently have a stream of lease income?

A Would this be potentially?

Q Actual payments coming in now where you got an agreement.

A Actual lease payment coming in now?

Q Right.

A I believe that is only two.

Q That would be Louise Gray and the Masons, which is now the --

A San Luis Valley Masonic Association. That's the Masons.

Q That's not in Creede?

A That is not in Creede.

Q Is that down in --

A That's down in Masonic Park. That's no consequence.

Q That's below Wagon Wheel Gap?

A That's correct.

Q Within Creede, are there not a number of properties that are situated on the right-of-way?

A Correct.

Q To what extent, if any, have you identified those properties and determined the amount of land they occupy?

A We had the existing leases from the Denver Rio Grande, Southern Pacific, Northwestern and Union Pacific Railroad Company, which are their successor. Those were forwarded to us. The document that reflects that we are in those leases has been assigned to the Denver Rio Grande Historic Railroad Foundation. That shows that we are now in succession and within the text documents of the lease itself is a diagram, a drawing, that shows the amount of area that each lessee occupies.

Q What are those size ranges? Are you familiar with them?

A The size itself, off the top of my head, is actually difficult, unless you have the document in front of you. They can range from a few hundred square feet to a few thousand or, as in the case of Tompkins Hardware and Lumber Company, they occupy a significant area.

Q A couple acres?

A I'm not sure what it is. I wouldn't want to

speculate.

Q An area of 43,000 square feet?

A Forty-three, fifty-three sixty, but why split hairs. I don't know off the top of my head how much area they occupy.

MR. MICKLEWRIGHT: Are we talking about how much area of the right-of-way they occupy or how much area the business occupies?

MR. ALLEN: No. How much of the right-of-way they occupy.

MR. MICKLEWRIGHT: Okay.

Q (By Mr. Allen) Do you have plans or, at some point, do you intend or -- by "you," I mean the Foundation. To actually go out and get either surveys or some reasonably accurate, currently validated measurement of boundaries and areas occupied by residences or commercial properties that are on the right-of-way within the city of Creede?

A Does the Foundation anticipate going out and hiring a surveyor to survey that portion?

Q Well, there's all variations on that. You don't have to hire a surveyor. You can go out yourself with a 100-foot long tape and, you know, get somebody to hold the other end and get a reasonable --

A We can get a reasonable idea from simply

holding a tape. That, of course, in this day and age, isn't quite as accurate. We do have global positioning available which is far more detailed and accurate. It's pretty clear. I mean, there's very well-defined evaluation maps that have been in existence since 1891 that specifically address the width and length of the right-of-way; and, from those, we can certainly tell, you know, where our right-of-way boundaries would cease. Now, given the case of --

Q Okay. That tells you where your right-of-way is. Now, the next question is: What steps are underway or what documentation exists or what plans do you have for further detail or whatever, to define actual boundaries or areas that are occupied of individual residences or businesses on the right-of-way?

A Well, at some point in time, I'm sure it would be deemed appropriate to get a full blown survey done of that area. It is also my understanding that a survey was just recently performed in Creede. Now, this is third-party information. Whether or not this was done by the city of Creede or the concerned citizens for the corridor or by whom, I don't know, but we were informed that a survey was done.

MR. ALLEN: Could I have a moment?

(Discussion off record.)

MR. ALLEN: I've been advised by Mayor Myers, "By some of the land owners on the block." By that, I assume it means they've had some surveying done, but it's not complete.

THE WITNESS: Was this Davis Engineering?

MAYOR MYERS: No.

Q (By Mr. Allen) Do engineering companies go out and do that on spec, just to have a database that they can then settle? I don't know.

A I don't know either. I'm not an engineering company.

Q Or surveyors?

A That's their time. That's their stock and trade. Just like a lawyer, I would assume they're going to go out and get paid handsomely for it.

MAYOR MYERS: Do you want me to answer it? What they do is, like Davis Engineering, they've been surveying in Creede for years and years and years. They use their corner points that they have identified to survey other portions of the town, but they don't go in and survey something just to be surveying it so that they have it on record.

THE WITNESS: Do you know if this work that was done recently by, for lack of a name, XYZ Surveyor, do you know if this work was done based on existing markers

that were placed there by either the railroad, or were they placed there by the survey that we know was done wrong back in about 1892?

MAYOR MYERS: I don't know the answer to that question.

THE WITNESS: Okay.

MR. ALLEN: Well, for whatever this is worth -- and I've done a fair amount of work over the last ten years involving buildings in Telluride, where, again, in the 1890's, they just mucked it up in terms of surveying. That's because nobody thought the towns were pertinent.

THE WITNESS: Evidently, they weren't.

MR. ALLEN: Mining claims were carefully surveyed and jacks put in towns, and they were pretty casual about where things were because they thought they were putting up little wooden jacks that would last for five or ten years while they mined out that load and moved on. Now, of course, millions of dollars are involved in real estate values in the towns.

THE WITNESS: Uh-huh.

Q (By Mr. Allen) Well, it is fair to say, is it not, that, one, the Foundation, as the owner having the right to use the right-of-way, asserts the position that it's entitled to rental income from properties that are on

the right-of-way?

A Well, it is my understanding that the Foundation is the owner of the right-of-way based on the transference of documents, being title documents, etc., specifically defined by those documents transferred from the Union Pacific Railroad which, of course, is in succession from Southern Pacific, Denver and Northwestern.

Q And the Foundation's predecessors and interest, namely, Union Pacific, Southern Pacific, D&RG, were certainly collecting rents from at least some of the rental properties on the right-of-way?

A They were. There is historic data to support that.

Q And when you bought the right-of-way from Union Pacific, those lease holding lists were assigned to the Foundation? When I say "you," I mean the Foundation.

A That is correct.

Q What I'm now getting at is, the extent to which that represents a potential source or actual source of substantial revenue stream that can be used by the Foundation of recurring revenues coming in every month or every six months or however often, to address some of the Foundation's other financial requirements. So that we can get a handle on what it is and about what it can be.

And, if you will, or if Mr. Micklewright would let

you do so, I would like you to just explain where real estate leasing fits into the scheme of things for the Foundation as one of its profit centers or revenue contributors or whatever.

A Well, as far as the leases within the city limits of Creede -- and the majority of those, as you know, are on the west side of Main Street within the confines of Section 25. Those leases, there isn't any one of them that is of any significant value as far as the dollar amount. I mean, we're not talking about gobs of money that are going to have a dramatic effect on the operation or viability of the railroad, nor were they ever looked at in that light.

These were and are and do represent a viable income stream based on their historic use and the fact that these leases have existed for years and years and years and were paid on by the lessees to the lessor, the railroad, for years and years and years.

It is my understanding that -- and, again, this is third-party information, but it is my understanding that we did issue a number of new leases to the tenants along the line, of which there are a lot more that need to have leases issued to them. But it's my understanding that the Mayor did take it upon herself to advise people not to sign these leases. And, again, I'll state for the record that this was third-party information. I don't know this to be

factual, but it has been conveyed to us a number of times by a number of different people.

We're not talking about a fortune in these leases, so I'm not going to sit here and say, "If I don't have the income from these leases, we can't rebuild the railroad." That simply isn't the case.

Q But they could be a significant contribution?

A Anything can be a significant contribution. These will be a contribution of a certain amount, but everyone there, with the exception of the Masonic Park and Louise Gray, have chosen to look to their counsel as opposed to executing a lease document or vacating the property.

Q Have you established some sort of a scale of what the Foundation regards as a reasonable dollar value per square foot or per acre or some basis for leasing?

A Leases were calculated on the value per acre divided down and multiplied by a factor based on the square footage with a number of other factors that were involved. It was a complex formulation which I don't have in front of me, nor am I able to pull off the top of my head. But they were also a fair and equitable lease and, given the value of commercial ground within the city of Creede, quite a deal for the lessees.

Q Well, the Foundation would be within its rights, would it not, to either use measurements it has of the footprints of what's occupied or go out and make measurements and then lease those properties to the occupants of the right-of-way at prevailing commercial rates or residential rates within Creede for comparable properties. Is that a fair statement?

A I would feel that the Foundation would be well within its rights to do so.

MR. MICKLEWRIGHT: Well, let me object to this line of questioning. I mean, is this getting to a zoning question?

MR. ALLEN: Yeah. What I want to do is establish that -- ultimately what I'm driving at is two different but linked issues, Ray.

One is revenue stream, to get some sort of sense of whether or not there is a source of revenue out there that is sufficient to give anyone any basis to infer that there will ever be enough revenue to operate a railroad. Okay.

What I'm telling you, and I recognize you disagree, is, we think there is not a sufficient revenue stream to operate a railroad and that that's potentially fatal to the rights to continue to have OFA rights. And Mr. Shank has just said that this isn't a big source of revenue. So I want to try to get definition here. I want to get a

quantity of site per square footage, acreage or money that this represents.

I also want to be able to establish that the impact of Creede's zoning is not merely hypothetical; that the Foundation exists within a matrix of real estate transactions, development, usages and so forth. So to the extent that the Foundation is engaged on its right-of-way in non-railroad activity, nevertheless -- you know, based on a lot of the law you cited involving what railroads can do with their rights-of-way, gas development, timber, etc., that there is an area for legitimate police power exercise as to non-railroad activities on the right-of-way.

MR. MICKLEWRIGHT: I don't mean to argue with you, but you're not asking him about what might occur in terms of what the railroad is doing, but you're talking about whether or not or what is the nature of existing businesses now, which I would assume are subject to regulation by the city of Creede, so --

MR. ALLEN: No. I mean, maybe somebody is going to assert that the city of Creede cannot exercise its zoning on Section 25 with regard to BJ's gallery because that's preempted by potential railroad activity or that the railroad's leasing regime was part of its activity, but we had early on in this, a letter from your co-counsel, Mr. McFarland, with kind of a global statement of total -- from

one side of the right-of-way to the other, the railroad owns it all, the railroad -- the Foundation controls it all, needs it all, is presumed to need it all, etc. I'm trying to -- I don't think that that aggressive a statement is valid.

I'm trying to get a sense in a real world situation in Creede of what are the boundaries of the potential application of the zoning on the one hand and the potential application of the preclusion or preemption on the other hand.

MR. MICKLEWRIGHT: I understand that.

MR. ALLEN: So to get a sense of what this lawsuit is about and what Creede's rights are vis-a-vis the Foundation. I mean, one of the things that may eventuate, since 90 percent of all litigation is settled, is that what we do in this litigation is form a dialogue in which maybe ultimately somebody comes to some sort of agreement rather than a litigated outcome as to who's doing what in Creede. You know, who's regulating what, who's charging what, who's paying what, for what it's being paid, what are the standards by which those things are established? You know, is the Foundation doing customary rents; Louise Gray? Is it doing market value rents? Is it somewhere in between? Where does this fit into the Foundation picture?

MR. MICKLEWRIGHT: They're a landlord.

MR. ALLEN: Okay. I want to get — rather than you say that, I want to get Mr. Shank to explain, because he's the guy who's been authorizing the correspondence, I presume, making the phone calls, having the communication, to describe where a leasing regime, which is obviously part of what they're doing, at least at some level fits into the overall plan. How much revenue it can generate, where they need to go with it, whether they're going to go out and do measurements or whatever. Whether they're going to get an appraiser in to say, "Here's what is fair."

I just want to know what they're dealing with here. It seems to me, since there is clearly some sort of an undertaking to continue what Union Pacific and its predecessors were doing, all of which is on Section 25, I want to get a sense of that. And since Section 25 is a potential reversion to the town under 43 USC Section 912, if there is an abandonment, I see all of this as being a part of what we're dealing with, and I don't think it's terribly sensitive. I'm happy to preserve confidentiality as to what gets said by Mr. Shank to a particular person, but that's where I'm going.

MR. MICKLEWRIGHT: Is it your position that Section 25 has reverted to the city?

MR. ALLEN: No. I mean, it can only revert

to the city under the doctrine of law I made in the Phillips case. By the Phillips case, I think that I established forever and for all time that nobody but the Surface Transportation Board authorizes abandonments. That's what the ICC said, that's what the STB said, and that's what the circuit courts agreed with, and that's what the Supreme Court denied per curiam.

So we know where we stand. It can only be abandoned if the STB says it's abandoned. If it's abandoned, it reverts, where it's in the municipality to the municipality. Outside the municipality, it reverts to the adjoining landowners. What I want to get a sense of is where this fits into the Foundation's strategy or business plan for what its revenue sources are.

MR. MICKLEWRIGHT: Okay.

Q (By Mr. Allen) So if you can explain that rather than have me ask it question by question, I'd be delighted to have you do so.

MR. MICKLEWRIGHT: I'll object. It calls for a narrative, but if you can, answer it.

A I'll try to answer this in narrative form, but let's keep it brief. Obviously, this is a separate function of the Foundation as opposed to operating a train or anything else. This is another source of income. It's a revenue stream. Yes, it's there. It's rights that were

passed down to us, to the Foundation, from the predecessor railroads. Leases existed. People benefit from the utilization of the railroad right-of-way.

A prime example being Mayor Myers. She has Amethyst Emporium at the back — and I'm not sure of what the number is. I had it suggested to me, the back third or back 40 percent of her business resides on railroad right-of-way. Whether that is the truth or not, I don't know. I'm going by the square footage identified by the railroad and the fact that the lease was paid for years and years and years by Margaret V. Myers, Mayor Myers' mother, was passed to her, and a similar situation with other lessees along the area. Yes, it represents an income stream. As I stated previously, no, we're not going to get rich off of this, but it does represent funds that can be utilized for the benefit of the Foundation, for operational costs perhaps of the office, but it can be thrown in the —

Q You can buy ties, you can buy rails?

A We can do a number of different things with it. We're not going to rehab a whole railroad based on the leases we have in Creede, but every bit of income is important to the Foundation. And we don't feel that we should be forced to overlook any income stream.

Q How many properties approximately are there within Creede that could be leased, that could have valid

leases on them?

A There is a number of them. As I stated earlier, there is a number that do not have a lease that do occupy a portion of that right-of-way.

Q Can you quantify that? Is it 20, 50, 1,000?

A I guess it could be somewhere between 15 to 20.

Q About what percentage does that represent, say, of the total commercial inventory of real estate in Creede?

A I'm not sure. Perhaps Mayor Myers could enlighten us.

Q If you had in place the kind of leasing regime that a real estate operating company would have —

A Real estate management firm?

Q Real estate management firm.

A All right.

Q Where, on a fair basis, you are leasing all of the land that was occupied to the tenants at reasonable rates. Maybe market minus ten percent or something.

A Whatever.

Q If that were the case, would the Foundation then be likely to be the largest commercial landowner — landlord in Creede?

A I don't know. I don't think so. Creede

covers a lot larger area than what we're talking about here. We're talking about the west side of Main. What, a one, two-block area?

Q But I would think that most properties in Creede are owner occupied. So if we talk — if we confined this dialogue solely to properties which are occupied by tenants.

A Some say owner occupied. That would be admitting facts not in evidence. I don't know what is owner occupied versus what isn't.

Q Okay. A fairly viable national statistic that seems to hold up in the United States over generations is about 60, 65 percent. Generally speaking, 65 percent of all the real estate in the United States —

A Is owner occupied?

Q — is owner occupied.

A I don't know if this would —

Q I don't know if it's true in Creede or not.

THE WITNESS: We can deal with the Mayor. Do you have any historic documentation to support that?

MAYOR MYERS: With the exception of five businesses, I believe all of the rest of the businesses are owner occupied.

THE WITNESS: Is that the case within Section 25, west side of Main?

MAYOR MYERS: In Section 25 of the west side of Main, all of them are owner occupied.

THE WITNESS: Every one of them?

MAYOR MYERS: Well, I take that back. Sorry. Not the Masonic Lodge. It's owner occupied in the sense that they occupy the upstairs and they lease the downstairs. But I'm trying to go down the block, and I believe all the rest of them are owner occupied.

THE WITNESS: Okay.

Q (By Mr. Allen) Okay. Once you've made the final payments to Union Pacific, you're going to have a book value investment of something like -- what? $600,000?

A Just for the purchase alone?

Q For the purchase of land?

A Six and a quarter.

Q Okay. To what extent does a revenue stream from a leasing regime within the city of Creede alone — I'm not talking about the other 20-plus miles within the right-of-way. But in looking at producing a return on that investment, what is the maximum that you might be realizing from lease rentals from Creede if you had everyone on a lease and you had them all performing?

A I don't have those figures. We haven't calculated out the figures for the people who haven't had a lease. We only did it for the people that have had one and

then paid all these years and then chose not to upon our purchase. I can't give you that figure. I don't know what the return on investment would be on that. I don't know what factors we would be looking at. We don't have the data right now.

Q Somebody prepared them. I've seen the leases attached, a couple of them, to documents I found. These are very carefully drawn commercial lease documents. I assume they're all pretty much the same document. I assume at some point you or somebody working with you gave some thought to what kind of a lease you were going to have with tenants on the right-of-way, fairly careful thought?

A Yes.

Q I recognize the privilege, but I'd be interested in knowing who drafted the leases, whether you did or counsel did so, or a combination of that or whatever?

A It's a combination.

Q They looked to me as though they were a lease document base — if you will, base form that was particularly crafted to address occupation of a railroad right-of-way in terms of insurance clauses and a lot of other things. Is that fair?

A There is verbiage within the text of the lease that is specific to railroad.

Q May I ask, was it Mr. McFarland? I recognize he is an expert in railroad right-of-way matters. In other words, was it he who was the sort of master architect of the lease structure?

MR. MICKLEWRIGHT: I'll object to the scope of the question and foundation. Are you talking about the current leases, or are you talking about the Union Pacific leases?

MR. ALLEN: No. Talking about the leases that were drafted by Mr. Shank's foundation and proposed to at least several of the tenants, which looked to me to be pretty much the same form, I mean, attached to Louise Gray's lease and I think one other. And I just wanted to know where that came from, who was the architect of that lease documentation.

MR. MICKLEWRIGHT: Objection to relevance. Can you answer that question?

A I could answer it. The lease document in its current form is a compilation of a lot of similar information from historic leases, leases that were in place previously by the D&RG, with Southern Pacific, some new information that was placed within the text of the lease as suggested by Union Pacific and also and then sent for review and modification by Mr. McFarland.

Q (By Mr. Allen) Ultimately, do you think it

might become necessary to actually litigate the issue of whether the people are going to or not going to pay rents to the Foundation?

A Well, I would certainly hope that it wouldn't come to that. I think these people are wrong in the manner in which they're going about this, which includes Mayor Myers. I think all these people benefit from the railroad right-of-way to use for their commercial and personal property. They're gaining, they're generating revenue by virtue of the availability of that property, and I certainly think that that has value and that we should be entitled to compensation for the use of our property.

That's historically what has taken place. And simply because we're not the multibillion dollar conglomerate that the Union Pacific or Southern Pacific or Denver Rio Grande is or was, I don't think our rights are any less and we shouldn't simply be looked at as this small Colorado charitable foundation. "Let's go take advantage of them." I don't think that's appropriate, and that seems to be what the nature and scope of their mission is.

Q Have you been following the dispute that's ongoing between the Union Pacific and the city of Aurora, Colorado regarding right-of-way leasing in Aurora?

A I heard bits and pieces. I'm not real well versed in it.

Q As I understand it, Union Pacific has asked that a leasehold rental for an Aurora city street that is on a 1975 Act right-of-way be increased from 7,000 a year to seven million a year.

A I think that if you review the lease documents that these people all executed with the predecessors and you look at what's been issued by our foundation, I don't think you're going to find a rate of increase even remotely close to that.

Q Okay.

A I'm not going to agree or condone what they're doing with that. That's a different company and different issues. I'm sure they have their reasons for attempting to increase a lease evaluation of that magnitude.

Q What is your sense of a fair either monthly or annual square foot ground lease for commercial property in the city of Creede today?

MR. MICKLEWRIGHT: Objection. Relevance. Calls for speculation.

A Because of the fact that I don't have my facts, figures, square footages, location usage and formula, I can't really give you that figure at this time.

Q (By Mr. Allen) When you've sent out proposed leases to businesses, for example, are those based

on some kind of regularized negotiation of what your return should be? I mean, I recognize you would adjust one property up maybe for a better location and another one down for a poorer location, but is there some negotiation for a base rate in there that you think the Foundation should be getting, generally speaking, for its —

A All right. As a prime example, Allen, the lease that was executed, funds forwarded by Louise Gray was our minimum lease. We did not take into account location, square footage, use or anything else. That was just simply the minimum figure.

Q You think $300 a year is a fair kind of nominal rent for residence for someone like Louise Gray?

A I do. And when you realize that 25 years ago, she was paying 250, I mean, an increase of $50 over that time period, I do not feel is exorbitant.

Q Is there some kind of — when you sent out the letters, you sent out something like a dozen letters of proposed leases?

A I'm not sure of the number. It could be ten, twelve. I'm not positive.

Q From a range of like from eight to twelve letters. These would be people who already had leases with Union Pacific or its predecessor?

A Historic lessees.

Q Okay. Is there some kind of a template or a standard, or whatever, by which you have made a proposal to these individuals or businesses for what their rate of leasehold rent should be?

MR. MICKLEWRIGHT: Objection. Asked and answered. Relevance.

MR. ALLEN: I'm trying to get at a revenue stream, Ray. That's all.

A Well, the tenants aren't paying. There isn't any. There isn't any revenue stream. No revenue trickle.

Q (By Mr. Allen) But it's just a matter of probably a few letters from Ray Micklewright, and they'll either be paying, or they'll be defendants in lawsuits. I mean, if you got the rights you have, and I'm not debating them one way or the other, and you're not being paid, the Colorado law is pretty clear that you're entitled to recover fair rental value.

A Or they vacant.

Q Or they vacate. You can kick them out.

A Which is not my preference, by the way.

Q I understand. You'd rather be paid than — you know, you'd rather have them paying you than you paying Ray Micklewright?

A We discussed surveying this earlier. The

cost of a survey would be probably more than the aggregate of 90 percent of those leases, so — you know.

Q But you could arrive at approximate square footages without going to the full blown certified survey.

A We can take the survey from the railroad — we can look at the historic leases executed by the current lessees or the owners of these properties. They acknowledge this lease. They signed this lease with the predecessor railroads. So, it wasn't a matter of dispute. They signed it. They were paying their lease. Now suddenly, you know — whatever. I can go by the square footage as identified on the railroad drawings within those old leases.

Q And come up with —

A And come up with a formula and factor for determining what their rental should be. And I think predominantly the various businesses along the west side of Main, for the most part, would be paying a relatively close figure based on the square footage.

Tompkins Hardware, of course, is a major exception because that's a company that is clearly depending upon the usage of the right-of-way for their business, for their livelihood, for existence, because they've got their whole lumberyard on the railroad right-of-way. A good portion of their retail store is on railroad right-of-way. So, that's

a major factor, and they utilize a big piece of the ground.

Q Okay. What is the highest amount that you have sought from a prior acknowledged lessor — lessee of railroad right-of-way real estate?

A I would say that probably — and without having all of the files in front of me, I would say it's a fair assumption that Tompkins Hardware would probably be the largest by virtue of the fact —

Q You made a proposal to them. I take it, you sent them a lease and said to please sign it?

A I sent them a lease with a standard letter accompanying the lease, "Please execute within 30 days. If it's your choice not to lease this property, please make arrangements to vacate."

Q Can you recall what the annual figure was that you asked?

A I can't. It's been a while since I looked at it. These things were sent, ignored, and they were advised by Mayor Myers — again, this is third-party information — not to sign. Join in, hop in the fight, and let's go at it. I can't speak for them. I'm not going to speak for the Mayor. I don't remember what the figures are at this time.

Q Okay.

A That stuff is all available to you. It's in

the files.

MR. ALLEN: I think I put a sticky on each transmittal letter of the lease document, but if I didn't, I don't want the same boilerplate form over and over and over. But I would like the transmittal letter and a top sheet, whatever, that would show us the proposed lease amount in the document production. And I don't want a replication of all 35 pages.

THE WITNESS: The lease document. You want the meat-and-potatoes of the lease.

MR. ALLEN: I want to know what the potential pricing is and what the potential revenue stream is so we can try to get some sense of what's going on here.

THE WITNESS: Okay.

Q (By Mr. Allen) We talked about liability insurance. Do you know what premium is being paid annually for insurance on the right-of-way?

A Dollar amount?

Q Yes.

A Eight hundred and something.

Q For a year?

A Yes. It's for two million in coverage, I believe it is.

Q Toxic waste?

A I haven't been —

Q The right-of-way crosses, before coming up from South Fork and before it gets to Creede, an area that's owned by Hecla, H-E-C-L-A, Mining. Am I correct in that regard?

A I believe that's correct. I know there was some talk it was potentially going to change hands. I would yield to the Mayor.

THE WITNESS: Has anything come of that?

MAYOR MYERS: Not at this point.

Q (By Mr. Allen) Situated on that area or ground are what, mill tailings, something?

MR. MICKLEWRIGHT: Objection to the foundation.

A I'm going to assume that's what's there. I haven't analyzed it myself.

Q (By Mr. Allen) Was there any discussion or any documentation between your foundation or you individually and Union Pacific regarding potential responsibility or designation of your foundation or Union Pacific as a potential and responsible party for cleanup or reclamation of that area where your right-of-way crosses?

A It would only be specific to our area and Union Pacific identified that as a potential site and passed the liability to us.

Q Are you acquainted either generally or

specifically with what's called CERCLA?
A Yes.
Q Comprehensive Environmental Response, Compensation and Liability Act?
A Yes.
Q Do you think one of the reasons that institutions such as Union Pacific are receptive to sale off of the last ten miles going into a mine is that, even if they can't escape total potential liability under CERCLA for cleanups that may be associated with that, they, nevertheless, put somebody else out there such as your foundation in the — if you will, the primary sights of somebody such as the EPA or the Corps?
MR. MICKLEWRIGHT: Let me object to that on the foundation or grounds. Is this a piece of property that's in the city of Creede?
MR. ALLEN: Right next to the city of Creede. Part of it is in the city of Creede.
MR. MICKLEWRIGHT: Okay. If you can, answer that question based on what you think they might do.
A You're asking me to speak for the EPA?
Q (By Mr. Allen) No. I'm asking you to speak for what communication you had from Union Pacific either orally or in writing regarding potential responsibility if that ever becomes an active cleanup area or if EPA or

Corps, by Corps, I mean Corps of Engineers, desired to take an aggressive stance in saying this has to be cleaned up and goes out after PRPs and says to them, "You got to contribute"?
MR. MICKLEWRIGHT: Objection. Relevance.
A I'm aware of the site. I've met with Zeke Ward and talked to Zeke Ward on a number of occasions.
Q (By Mr. Allen) Who's Zeke Ward?
A He is the chairperson of the Willow Creek Reclamation Committee. And I have spoken with Union Pacific on the matter. We have looked at documents pertinent to this. It is not at this time, and I was advised that it was not going to become an EPA Super Fund site. Do I have assurances and guarantees that that would be the case from now until doomsday? No, we don't have that, but we were willing to forego the information and go ahead and consummate the purchase.
Q Have you had communications with either EPA or the Corps of Engineers about clean-up responsibilities or contamination or anything of that nature relating to anywhere that the Foundation right-of-way crosses or is in contact with either the mine tailings or any other toxic discharge issues?
A I've spoken with a number of people at various agencies regarding this situation; and it is their

determination that, at this time, the site is stable and has been stable for some time. And we're not going to come through there with a railroad right-of-way in an invasive manner. We're not going to create any major disturbance in there. Certainly we need to rehabilitate the track to run through there, but it's not like we're going to come in there and do any earth moving. That's not in our game plan.
I have the names of two individuals on my desk which we were going to talk to and look for a bid from them to come in and do some mapping so we know exactly what is present within the right-of-way, within the track structure itself, within 18 inches of the surface. And they're going to do a mapping, and we can simply be indemnified from that by virtue of the fact that they find nothing present of any significance.
Q I saw a letter from EPA that said that — no. I guess the Corps. That addressed Willow Creek where, I guess, you've done some earth moving, and the Corps said they did not think that what you had done required 404 permitting under the Clean Water Act.
A Right. All we simply did — in fact, I can show you a picture in this book, and I think I showed you that before. It may not have been on the record. I can show you again.

Q No. That's okay.
A It was a simple, small, little area with a quasi crossing, if you will, an area that was simply filled in with material. And we were informed that the material that was brought in for that crossing was clean and tested prior to its placement, but an area where they put fill across the tracks so earth-moving equipment could move over there and access the mine tailings to place the cap upon it, and we simply removed that material that blocked our free and unrestricted movement of our maintenance equipment.
Q The right-of-way intersects both Willow Creek and the Rio Grande River at numerous points, right?
A It intersects Willow Creek at one point and we cross the Rio Grande at three points.
Q Okay. Are these crossing points within the city of Creede?
A I think the Willow Creek, the little bridge there may be within the confines of the city limits. Other than that, none of the Rio Grande River crossings are in the city of Creede.
MR. MICKLEWRIGHT: I'll object to questions that address —
MR. ALLEN: I think all this goes to what the potential cost parameters are. You recall the

magistrate said — Judge Shaffer said I could inquire what it's going to take to get the railroad operational.

Q (By Mr. Allen) The next question is bridges.

A We discussed that at our last deposition.

Q I think you said that you don't have any engineering — consulting engineer studies on the cost of that?

A Rehabbing the bridges? Not at this time.

Q And I noticed looking through your files this morning, Union Pacific has an entry that identifies, I think, five bridges, all of which were built between 1900 and 1910?

A Uh-huh, 11. Yes, sir.

Q Have you had any discussions with either the Corps or EPA about clean water permits, that you would need 404 permits or you can operate under an issue permitting system to do work on the bridges? I assume, you can't do work on the bridges without getting into the water?

A As a matter of fact, the investigator from the Corps of Engineers that came out to investigate complaints that are levied against our foundation by the city of Creede regarding dirt movement within the confines of the Willow Creek reclamation area, that lady came out, she spent nine hours to do this, three and a half each way,

two hours on site.

It was her opinion to myself that we had done absolutely nothing wrong out there. We weren't even remotely close to the historic high water mark, the 100 or 500 earmark. And she said, "In the future, if you need any assistance in obtaining 404 permits for whatever work you may need to do within the channel or along the edge, they will be done in the most expeditious manner." She would see to it.

Q But she did advert to the possibility that you might need 404 permits to get into the —

A We might. Some area where it's simple maintenance of the right-of-way, etc., no. Depending how invasive we are within the channel itself, yes.

Q Do you have any OSHA compliance issues?

A Not at this time.

Q I take it, you will if and when you start hiring people in any significant numbers?

A Uh-huh.

Q What about the volunteers that work out there on your right-of-way? What workplace protections are they required to have or do you impose or practice?

A We have a safety program that is in place. Problems with volunteers out there on the line have been minimal by virtue of the fact that we do have a safety

program. It calls for specific gear to be worn, eye protection, hard hats.

Q Steel-toed shoes?

A One-inch defined heel. Reflector material on our vests, 105 square inch, etc., etc., etc. So we remain in compliance. We do have an active safety program, and anyone that wants to come out and work as a volunteer goes through a small indoctrination and seminar, if you will, on what the requirements are so they are properly informed.

Q How much money does the Foundation need between now and a date when it is operational for the freight rail service to get to operational freight rail service?

A I don't have that figure in front of me.

Q Do you have such a figure?

A Not at this moment because, as I stated previously in my last deposition, so much of the costs that we thought were going to be significant turned out to be minimal by virtue of the availability of equipment through donation, through auctions, pennies on the dollar. It's dramatically reducing our rehabilitation costs and so the figures are all skewed so we don't have an exact approximation on that or even a cursory approximation on that.

Q Other than yourself and Leslie Parsley, has anyone else worked on fund-raising for the Foundation?

A Matt has, I believe.

Q You're gesturing to Matt Codder, who is here with us?

A Cutter.

Q Cutter. Sorry.

A Yes.

Q Have you as the Foundation ever prepared a prospectus or brochure or anything of that nature to present to a potential funding source?

A Asked and answered at the last deposition, but I'll certainly answer it again. We have worked out a number of different formats of data and brochures available. They have been a work-in-progress; and as the nature and complexity of this project has changed, so have they. We don't have a current flyer at the moment, but we've been working on one that's going to be available soon.

Q Is there a draft of such a document now?

A I believe there is.

MR. ALLEN: Ray, I'd like to request that. It would be subject to the confidentiality restriction. Okay. I want to take about five minutes to confer with Mayor Myers and I think I'm finished, but I don't want to

wrap it until I know that for sure.
(Recess is taken.)
Q (By Mr. Allen) In going through your corporate stuff, I noticed a filing somewhere that identified four or five people as your corporate board members?
A Yes.
Q And I can't recall their names. Who are your board members?
A At this moment?
Q Yes.
A Myself, Robert Shank.
Q That's your --
A Brother.
Q Does he live in Durango?
A No. Tennessee. Richard Millard.
Q Millard?
A And we had the resignation of William Colley. Dr. Martin Piernock and Robert Graham.
Q Wasn't your former wife at one time a board member?
A In the very early stages of this, but the IRS, while we were getting our nonprofit status, said we were family, and she dropped out.
Q Does she still have any entitlements, if you

will? Is she owed money?
A Nothing.
Q Is anybody out there other than you? I mean, you've provided the Foundation and taken some notes --
A Yes.
Q Is anybody else owed any money other than you?
A Not other than some minor bills.
Q I don't mean trade suppliers. I don't mean the phone bill.
A No.
Q Do you have an accountant?
A We use DJ's Bookkeeping Service which is Denise Jackson.
Q She's here in Durango?
A She is. And we have also employed -- God. The name is right there. We're getting on in the afternoon. Give me a minute. Dennis Haley.
Q He's a bookkeeper also?
A Accountant. CPA. Firm of Haley, Breed and Crom.
Q I think you said at one point, probably off the record, that you had not -- when we were looking through documents this morning, that you had not filed a

Form 990 for the Foundation with the IRS for the year 2000?
A That's correct.
Q And that you thought you probably would not be required to?
A We're not required to by virtue of the dollar requirement. We are going to do so as a courtesy.
Q How much income did the Foundation have in 2000?
A I don't know. Denise would be the one you need to talk to on that. I don't remember the figure.
Q You had about 500,000 in '99, right?
A Something like that. Whatever is reflected on the 990s.
Q Would 2000 be comparable?
A No.
Q When did 2000 start to tail off in terms of contributions or donations?
A Right away.
Q Why?
A No, no. I say right away. I'm thinking 2001. I don't recall exactly when it started tailing off.
Q This lawsuit wasn't filed until early November of 2000, so this lawsuit can't have had much impact on the year 2000?
A The negative stigma that got attached based

on the repeated articles and statements by the mayor of being chained to the track and things of that nature, created a lot of unrest within the railroad community as to where this venture was going.
Q Have you stopped chaining the mayor to the track?
A No. It wasn't something we were going to do. This was something she volunteered herself. She said, "No train, no compromise." She said, "I'll chain myself to the track before I'll let a train come into Creede."
THE WITNESS: Correct me if I'm wrong?
MAYOR MYERS: No.
Q (By Mr. Allen) "No train, no track. I'll chain myself to the track"?
A It's a real shame that a municipality such as Creede won't let a business such as a charitable foundation at least a fighting chance to become operational in something that's always been there and is loaded with historic value.
Q Have you seen Hugo Shopping in Silverton?
A Yes. Have you?
Q Yes.
MR. ALLEN: I'm glad these people are in Silverton, not Telluride. I don't want a town full of T-shirt shops selling people ice cream cones.

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(Recess is taken.)

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Q Yes.

MR. ALLEN: I'm glad these people are in Silverton, not Telluride. I don't want a town full of T-shirt shops selling people ice cream cones.

THE WITNESS: Silverton took a pretty dim view of that statement that was made by BJ in another one of her documents that she didn't want to become another Silverton. Actually, Silverton sells a little bit more than ice cream cones and T-shirts.

MR. ALLEN: Hamburgers and beer.

THE WITNESS: I'll be happy to put the city manager of Silverton in contact with you, Mr. Allen. He might have a different opinion on that.

MR. ALLEN: He might have a different opinion, but I live in a town that does not have a tourist train and does have a very high-end tourist clientele.

THE WITNESS: Well, I trust you're not trying to equate Creede with Telluride.

MR. ALLEN: No. Creede doesn't have skiing and Creede doesn't have anywhere near the size of the valley that Telluride has, but I'm past apologizing for what seem to be elitist attitudes.

If you have an economy like Telluride or Aspen or Steamboat, people can earn a living, buy property and send kids to college. And every time I pick up to the Silverton newspaper, it's more -- my heart goes out to them. They're remote. They're high. They have great difficulties. It's what John Kenneth Galbreth said when I took economics from him. It's GU, geographically undesirable. It's difficult,

but an economy that's based on people coming in for two hours a day and making retail purchases at that level is a pretty distressed economy.

I don't know if they would be better off without the train. Maybe not. Maybe they would have nothing. I can't tell you, but I do know that there is a kind of Gresham's Law that operated with regard to tourist -- Gresham's Law. He's a Scottish economist of the 19th Century who wrote that base metal drives out precious metal, and I think that applies to tourism.

Once you've filled the town up with people looking for lunch for $6.95 and a souvenir, you've probably cut yourself off from the people who are going to buy a painting for $2,000 or a piece of sculpture or come in and build a three-million-dollar house. These are hard choices. The trains are great for Durango. I don't think it's great for Silverton. This is isn't a question. This is trying to -- I don't know if you've seen the world through this end of the kaleidoscope.

THE WITNESS: I think I've probably seen it from every end of the kaleidoscope.

Q (By Mr. Allen) But it seems to me that, generally speaking, grant making institutions, whether they are government agencies or private foundations or whatever, look for whether or not someone has local support and that

not having local support makes it very difficult to raise money. You've acknowledged that?

A Uh-huh.

Q It's difficult to raise money because you don't have local support?

A We have quite a bit of local support. Unfortunately, the opposition is always far more vocal.

MR. ALLEN: I think that's all I have, so we're done.

(Deposition concluded.)

SIGNATURE OF WITNESS

I, DONALD H. SHANK, hereby certify that I have read the foregoing transcript of my deposition taken on the 3rd day of August, 2001, and that I have listed all corrections thereto on the following page herein. Except for said corrections, it is a true and correct copy of my testimony given on that day.

_____

DONALD H. SHANK

STATE OF COLORADO)
COUNTY OF LA PLATA) ss.

Subscribed and sworn to before me this _____ day of _____, 2001.

_____
Notary Public

My commission expires: _____

PAGE	LINE	CORRECTION	REASON

STATE OF COLORADO) ss.
COUNTY OF LA PLATA)

I, CHRISTINA DISANTO, a Notary Public and Certified Shorthand Reporter, DO HEREBY CERTIFY that I did administer the oath to the witness herein prior to the taking of this deposition; that I did thereafter report in Stenographic Shorthand the questions and answers set forth herein, and the foregoing is a true and correct transcription of the proceedings had upon the taking of this deposition.

I FURTHER CERTIFY that I am neither employed by nor related to any of the parties or attorneys in this case, and that I have no interest whatsoever in the final disposition of this case in any court.

I FURTHER CERTIFY that I have retained the Original Copy of the deposition to seal and deliver to Mr. George Allen, Attorney at Law.

WITNESS MY HAND AND SEAL the_____day of August, 2001.

_____
CHRISTINA DISANTO, C.S.R.

My Commission Expires: 7/23/2005

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Case No. 01-B-318

CITY OF CREED,

Plaintiffs,

vs.

DENVER & RIO GRANDE HISTORICAL SOCIETY, et al.,

Defendants.

Proceedings before CRAIG B. SHAFFER, United States Magistrate Judge, United States District Court for the District of Colorado, commencing at 8:30 a.m., September 24, 2001, in the United States Courthouse, Denver, Colorado.

WHEREUPON, THE ELECTRONICALLY RECORDED PROCEEDINGS ARE HEREIN TYPOGRAPHICALLY TRANSCRIBED...

APPEARANCES

GEORGE ALLEN, Attorney at Law, appearing for the plaintiff (via telephone).

RAYMOND MICKLEWRIGHT, Attorney at Law, appearing for the defendant (via telephone).

MOTION HEARING

P R O C E E D I N G S

(Whereupon, the within electronically recorded proceedings are herein transcribed, pursuant to order of counsel.)

THE COURT: Good morning.

*TRANSCRIBER'S NOTE: Poor telephone connections-volume was better than clarity.

MR. ALLEN: Good morning, Your Honor. George Allen in Telluride and Ray Mickelwright in Colorado Springs.

THE COURT: All right. Supposedly one of you has a bad connection. Who's the person with the bad connection?

MR. MICKELWRIGHT: Mickelwright and I can just barely hear you, but I'll frame my ear to the phone here.

THE COURT: Well, Mr. Mickelwright, if you can't hear me, you can't hear me -- if you can't hear me, I don't know exactly how you can tell me you can't hear me, but do the best you can. And if we have to try to redo this at some other point today, that's fine.

MR. MICKELWRIGHT: Okay.

THE COURT: It doesn't necessarily have to happen today. What -- or this morning at 8:30. When is the deposition of Mr. Shrank (phonetic) presently scheduled?

MR. ALLEN: You're earlier -- George Allen here.

THE COURT: Mr. Allen, I can hear you. You don't need to constantly identify yourself.

MR. ALLEN: Okay. Thank you. We, Mr. Mickelwright and I, have agreed that if the Court orders that this is going to proceed, it will be at 1 p.m. on Thursday of this week. However, I would say this: For me to make travel plans, it would be greatly helpful to have a ruling this morning.

THE COURT: Well, I understand. But it's not much of a hearing if Mr. Mickelwright can't participate in a meaningful way.

MR. ALLEN: Right. I understand that, and I placed the call, Your Honor, using my own telephone conference capability, and if I need to get a conference call operator, I'm happy to do that.

THE COURT: All right. Well, listen, Mr. Michelwright, it's your motion for protective order. Tell me anything you -- any additional information you want to provide to me?

MR. MICKLEWRIGHT: (Poor connection and difficult to hear) Let me tell you. Here are sort of seven things. First, as the Court knows, Union Pacific owns the right-of-way of the South Fork-Creed line.

THE COURT: Who's tapping?

MR. ALLEN: I am. I'll --

THE COURT: Stop.

MR. ALLEN: -- take you up with a pen.

THE COURT: Good idea.

MR. MICKLEWRIGHT: Okay.

THE COURT: Go ahead, Mr. Micklewright.

MR. MICKLEWRIGHT: And that is sort of the status quo. At some point in time, the Union Pacific thought it would be financially advisable to abandon the Creed line. And --

THE COURT: Right.

MR. MICKLEWRIGHT: -- it was required that they do so pursuant to a specific statutory requirement.

THE COURT: Right.

MR. MICKLEWRIGHT: They filed their motion to abandon. Shank and the Denver Rio Grande (inaudible word) Historical Foundation submitted an offer of financial assistance to obtain the Union Pacific's right -- (tape cut out). Union Pacific, after protest by the City of Creed and in competition with another potential purchaser, agreed to sell its rights to Shank and the Denver Rio Grande Historical Foundation.

When an offer of financial assistance is ultimately approved by the Board of -- the Surface Transportation Board, there are certain appellate rights to those who have protested the acceptance and bona fides of the offer of financial assistance. It requires, because it's an administrative decision, that the appeal be taken

within 30 days. And the appeal or challenge to the OSA, if there was a subsequent offer of financial assistance, challenge needs to go to the Court of Appeals for the district (inaudible-noise on tape) and the railroad resides in this case in the Tenth Circuit.

Now, despite that, nothing has changed, essentially, since the time the Union Pacific owned the right-of-way and since my client agreed to assume financial responsibility for it and purchase it. What has happened in the meantime is I filed a motion for protective order and, essentially, we agreed that, because it was important for the City of Creed to conduct discovery for whatever reason related to the issue of whether the right-of-way -- well, it's regulated by the local zoning (inaudible), we agreed to just -- we went through with a deposition.

Not only did we go through with a deposition, sometime in June, I believe, but then in early August we went through a second deposition of Mr. Shank. And at that time, prior to the deposition, in order to facilitate the exchange of information, we made available all the books and records of the foundation and Mr. Shank relative to this railroad right-of-way.

Mr. Allen came down with the mayor of the City of Creed, went through it, and then we allowed them to conduct the deposition again, during which time my client, Mr. Shank

and the Denver & Rio Grande Railroad Historical Society, gave them all the information they needed but for, essentially, how much money my client has in his wallet today -- or at the time of the deposition.

And keep in mind that in this case there is no issue of either compensatory or punitive damages. Even if that were remotely a collateral issue in this case, it seems to me that there isn't a rule whereby they would be entitled to discovery of my client's current financial situation.

Now, all this comes back to this issue are they trying to challenge the OSA collaterally through this action. And the answer to that is yes. And so my client's current financial situation is immaterial, it's irrelevant, has not even the remotest relation to what's going on. And if it were of interest to anyone, I suppose it would be of interest to the Union Pacific to determine whether or not he can make good on his contractual obligations with them. And as far as I know, unless Mr. Allen knows otherwise, there is no problem with the Union Pacific.

THE COURT: Well, let me stop you just for a second. Let me --

MR. MICKLEWRIGHT: (Inaudible-continues speaking)

THE COURT: Mr. Micklewright, stop. Let me ask you a quick question.

MR. MICKLEWRIGHT: Yes, sir.

THE COURT: The -- you referred to your client's contractual obligations to Union Pacific. Now, it's my understanding that the entity or the individual that's made a commitment is the foundation, is that correct?

MR. MICKLEWRIGHT: That's correct.

THE COURT: I mean, your client, Mr. Shrank, has not made any written obligation. His -- any obligation he has or -- is through the foundation, is that correct?

MR. MICKLEWRIGHT: Yes. I mean, it's sort of -- one step back. The foundation owes the Union Pacific and my client has agreed to assist the foundation.

THE COURT: All right. And is that a written agreement?

MR. MICKLEWRIGHT: Yes, it is. I believe it's referred to, in fact, in the motion in opposition to the protective order. And I think we've made that available. My client's answered questions about that.

THE COURT: Okay. But to the extent that there is any firm obligation, it's the obligation that the foundation has to the railroad?

MR. MICKLEWRIGHT: Right. And those have been disclosed.

THE COURT: Right. Okay. Go ahead, I'm sorry.

MR. MICKLEWRIGHT: And that's essentially it. In addition, he has made available all his financial records

that were submitted in conjunction -- Mr. Shank personally, in addition to the foundation, has provided all that financial information to the plaintiff in this action.

And a couple of things: One is that when they went through and looked at the documents on August 3rd, my clients then made copies of those documents. We arranged to have them given to -- hand-delivered to Mr. Allen when he was in Denver last week and he didn't even come and pick them up.

The second issue is that we have a scheduling order despite the fact that I'm sort of being accused as the person not complying with discovery. If you look at our scheduling order, the mayor's deposition was scheduled to take place on August 20th or the 21st -- I don't have that right in front of me -- but despite repeated requests to get that done, it hasn't taken place yet.

So I'm sort of at a loss. I think we've provided all the financial material unless the Court sees that my client -- Mr. Shank's personal current information is relevant, I don't think there's any reason to provide it. And I think more in line with the Court's orders we're trying to allow them to have as much information as they are entitled to, and then some. So that's all I have today.

THE COURT: Mr. Allen? Very briefly.

MR. ALLEN: Okay. First of all, you have in the

package of materials attached to our opposition to the protective order, Mr. Shank's $400,000 guarantee of the obligations of the foundation. So he's on a written guarantee that was submitted to the Surface Transportation Board.

We have a documentary record and it's before Your Honor that the foundation is not current on its obligations to the Union Pacific nor does it have assets with which -- or finances with which to either rehabilitate and restore or operate this railroad bridge which brings his personal guarantee into play.

He testified that the foundation does not have the money to make the payment that was due to the Union Pacific of several hundred thousand dollars on September 2nd of this year, which we presume is now in default. And --

MR. MICKLEWRIGHT: Well, I don't think that's fair to make that presumption.

MR. ALLEN: Ray, I didn't interrupt you and I'd appreciate your not interrupting me. Okay.

MR. MICKLEWRIGHT: Sorry.

MR. ALLEN: Thank you. So on the record we have there are no assets in the foundation with which to carry out the things that the foundation and Mr. Shank said to Judge Babcock they were doing to operate a railroad, which Your Honor will recall is their defense.

When we moved to remand this case to the state court and said it didn't raise a federal question, they said no, no, it does raise a federal question. The federal question it raises is that we are operating a railroad line or are about to do so, and, therefore, the whole issue of whether or not there might be preemption by the STB makes it a federal question. Judge Babcock agreed with that. That's the law of the case.

The law of this case is there's a federal question here by inference because the defense to this litigation is this is an operating railroad subject to STB jurisdiction. So they're the ones who put the whole issue of operating a railroad into play. If it's not an operating railroad, then we -- and let me take a short path into this Hobbs Act --

THE COURT: No, I don't -- Mr. Allen, I want it to be very narrow in your discussion. Please.

MR. ALLEN: Okay. Let me be as tightly focused as I can. The foundation has no ability on the record that we have developed to operate this railroad. And in fact, the material before you raises a substantial inference that its initial submissions to the STB were fraudulent. It has a financial statement submitted to the STB of hundreds of thousands of dollars worth of collectibles and memorabilia and Mr. Shank in his deposition -- and we excerpted that in what's in front of you -- testified that the foundation has

never received those donations, does not have any written document entitling it to receive those donations, and that the donors have not delivered those donations, nor have they taken tax deductions for them.

So there is every reason to believe that this foundation, on the record that we have developed, has no ability to operate a railroad. That brings Mr. Shank's personal guarantee directly into play, and that's what we were stonewalled on.

Every time I tried to inquire into his pre' -- and he testified and said he could not -- on the day that we took his deposition in Durango, which was August 1st of this year, he could not write a $4000,000 check to the foundation to make the guarantee good.

THE COURT: Well, but I guess -- but I'm not sure that's particular dispositive, Mr. Allen, because he had no obligation to write the check on August 2nd.

MR. ALLEN: Well, this is --

THE COURT: The fact that he may not have the money or he may not have the financial wherewithal to pay a check on August 2nd, or whenever, all that means he may have allocated his funds differently and he's going to cash in his 401(k) or --

MR. ALLEN: Well --

THE COURT: -- sell securities.

MR. ALLEN: -- and that's what we tried to go into. And given the record we had developed and we handed him copies of collection cases where he was sued on his Visa account and sued in collection cases within the past year or two, we said, "Hey, we don't think you have an ability to do this. And we want to inquire into how you are going to be able to do that." He --

THE COURT: Well, stop. Mr. Allen, stop. Be quiet and listen for a second. Now, let me ask a very simple -- let me ask two very simple questions.

Now, you would agree with me, Mr. Allen, that if the foundation made the necessary payment on September 2nd, then the financial guarantee hasn't been triggered?

MR. ALLEN: No, I don't agree with that. I mean, the guarantee is --

THE COURT: But if the foundation is current in its financial obligations, then there's no need to draw on the guarantee. The guarantee only comes into play if the foundation isn't current on its payments. Right?

MR. ALLEN: I'm not sure. That is a matter of contract law between the foundation and Mr. Shank.

THE COURT: No, the bottom line is --

MR. ALLEN: It may be the foundation only meets the guarantee. They may have a right to enforce the guarantee whether they need that money or not.

THE COURT: No, but the bottom line is the guarantee only becomes relevant if the foundation is -- doesn't have the financial wherewithal to pay its bills on the day that the bill becomes due.

MR. ALLEN: I agree with you that if the foundation were --

THE COURT: All right.

MR. ALLEN: -- making its payments and paid all its obligations, and if it showed an ability to actually rehabilitate and operate this railroad, because it doesn't end with merely paying the Union Pacific.

THE COURT: But the obligations to run the railroad only become -- they're not -- it doesn't necessarily have to occur all at the same time. Now, my question is --

MR. ALLEN: Right. Right.

THE COURT: -- if there was a payment obligation from the foundation to the Union Pacific on September 2nd, it seems to me the first and most important question to ask would be was that payment made.

MR. ALLEN: I agree with that.

THE COURT: Okay. Now, if that payment was made on September 2nd so the foundation, vis-a-vis the railroad, is current, then my question becomes: What relevance now does Mr. Shank's financial condition have at all?

Because, Mr. Allen, I understand that you want to

pound the table, but I have reviewed your complaint in this case, and your complaint, strictly speaking, doesn't address Mr. Shank's financial condition. I'm also looking at the motion to take his deposition which you filed on May 18th, 2001.

And in that motion on page 7 you state, quote, the material we seek here is information regarding the affairs of the defendant foundation and its plans, financial ability and related material relating to whether it has any basis to implement interstate freight rail shipments. If, as Creed believes, the foundation has no such competence or resources and if, as Creed believes, the oppressive real estate and fund raising activities which the foundation is carrying on are ends in themselves and unrelated to carriage of interstate freight by rail, then as we demonstrate below, Creed and its residents would appear to have a clear right to seek relief from those activities in this forum, or to seek from the Surface Transportation Board revocation of the offer of financial assistance, which the foundation -- under which the foundation is proceeding.

Now, my question is: If the foundation is current on its September 2nd bill, then it seems to me the issue of the guarantee hasn't been triggered because the foundation doesn't need the guarantee.

So my question, Mr. Micklewright, to you -- and if

you don't want to answer, that's fine -- has that September 2nd bill been paid?

MR. MICKLEWRIGHT: I can tell you it's either been paid or the Union Pacific and the foundation have reached an agreement for an extension.

THE COURT: Well, have they -- is that a verbal agreement or is there some written understanding?

MR. MICKLEWRIGHT: I mean, I'd be happy to provide a copy of that. I don't --

THE COURT: See, the question I've got, Mr. Allen, is you want to explore Mr. Shank's personal finances. Well, Mr. Shank's personal finances, strictly speaking, may not be at issue yet. And you are entitled to take discovery of nonprivileged information relevant to the claims or defenses asserted.

And this is a lawsuit that seeks declaratory relief. It is a lawsuit which seeks a judicial ruling that the City of Creed zoning ordinance -- ordinances are controlling. Now, I fail to see how Mr. Shank's financial condition is relevant to the claim or defense raised in this lawsuit. And in fact when you filed a motion for leave to take Mr. Shank's depositions, your request was specifically couched in terms of the finances of the foundation.

You are now seeking more than you ever sought before. And at this point, until I know that that September

payment was not made, I fail to see the relevance of Mr. Shank's personal assets.

MR. ALLEN: Judge, may I respond to that?

THE COURT: Sure.

MR. ALLEN: The heart of the foundation finances is this guarantee. The STB in awarding the offer of financial assistance rights based that award on the financial representations made to it, and specifically referenced -- and I can't in the time available right now pull it up -- but the OFA award, which was made and which was contested, not by Creed but by other parties, specifically referenced this $400,000 guarantee. So this $400,000 guarantee is part of the foundation's finances.

THE COURT: Well, but, you know, Mr. Allen, I'm looking at a document dated May 30, 2000. It is the Service Transportation Board's decision, STB Docket Number AB-33, subpart number 132(s). United -- Union Pacific Railroad Company Abandonment Exemption. In the Matter of: An Offer of Financial Assistance, decided May 18, 2000.

On page 4 of this document, there's a heading Financial Responsibility, and the STB decision reads as follows: The city asserts that D&RGHF -- that's the foundation -- is not financially responsible. Then it goes on in the next paragraph: Whereas, here the finding is made that an offeror is financially responsible to fund the

acquisition and operation of the line for two years, its capability to conduct operations for two years is customarily presumed in the absence of persuasive evidence to the contrary.

It says here -- and then it goes on to say: Moreover, the financial responsibility of the foundation is not compromised by the fact that the purchase of the line is being financed in part with borrowed funds. And then it specifically rejected the city's claims to the contrary.

Now, my question is, at this point, you're entitled to take discovery relevant to the claims or defenses asserted. And I just don't see how Mr. Shrank's personal wealth is relevant, and I particularly don't see how it's relevant unless and until there's some showing that the September 2nd payment wasn't made, and so, therefore, the foundation is in arrears.

MR. ALLEN: Your Honor, let me try to deal with this as best I can. First of all, the Hobbs Act only forecloses with a 60-day statute of limitations, now 30 days, an appeal to the Tenth Circuit. That's 28 USC 2344. The administrative law that's applicable to this is the administrative law of the STB under which we're entitled as the voters have said repeatedly and as the Supreme Court refused to review in the Phillips case after the Tenth Circuit said it, you can always file based on changed

circumstances or new evidence. Okay. So we're entitled to STB determination.

These guys have said that they want this case to go to the STB. We've said if it's going to the STB, we want it to go on a fully formed record. Now, regardless of whether they can continue to get the Union Pacific to roll this date back indefinitely, which I guess they can do, I don't -- you know, as far as I know, the September 2 payment has not been made.

THE COURT: But you don't know what --

MR ALLEN: I think at a bare minimum I ought to be able to take his deposition to ask that question.

THE COURT: Well, you should have taken his deposition and you could have. You could propound your written interrogatories.

MR. ALLEN: I took his deposition on August 3rd and I asked him do you have the -- I asked him with regard to both the foundation and Mr. Shank whether he had or expected to have the ability to make that payment on September 2, and I got negative answers on both of those.

Then when I tried to go into his ability to make the guarantee good, I got stonewalled. So we're on a record where I have to presume that if he had 2 million bucks sitting somewhere, he'd have told us about it. But the reason that we're not being given answers on this is that he

can't make it good, which is consistent with the fact that he's being sued on his Visa account and he's got collection cases going against him.

And I don't want to be in the STB, where I expect we're going to be at some point in the next couple of months, with a record in which these guys still don't have -- are not operating the railroad. He's already testified back in his June 21 deposition that he did not expect that they would be in operation by Memorial Day 2002, which is the two-year presumption period the STB gives him.

So we've already got his testimony that they don't expect to operate within that two years. We got something -- and I just learned in the last few days, and I haven't been able to track it down, that there was a feasibility study done for another prospective purchaser in 1993 which put a price tag of rehab in this line at $7 million in 1993 dollars.

So I think that this thing is preposterous. And I think we're entitled to develop a factual record if we're going to be in the STB which will not -- does not have the capability and will not go out and send a hearing examiner out or an administrative law judge. This is going to come in on a referral from this district court. It's going to be Judge Babcock's referral.

And we're entitled to have that referral based on

the fully formed factual record. And that goes to a lot of issues beyond the mere issue of whether or not they can make the payment to the Union Pacific. Even if they make the payment to the Union Pacific, we would be entitled to inquire into their ability to actually rehabilitate and operate this railroad, because that's the representation they made in saying there ought to be federal jurisdiction is that they're running a railroad. That's their defense to the zoning claim.

MR. MICKLEWRIGHT: No, that's incorrect, if I can interject just a moment. Their claim is the city's zoning regulations preempts federal law.

MR. ALLEN: No, we don't say that at all, Ray. You know, if you're going to interrupt, I want you to be right. And that our --

MR. MICKLEWRIGHT: (Inaudible-both speaking)

MR. ALLEN: -- contention -- Ray, please. Our contention is that the zoning is applicable to non railroad activities on the right-of-way and your claim is that the federal jurisdiction under the STB is preemptive as to the entire right-of-way.

MR. MICKLEWRIGHT: Okay. What does that have to do with my client's financial situation currently?

MR. ALLEN: If he can't kick in the guarantee, which is specifically tied to the payments to the Union

Pacific, the guarantee says --

MR. MICKLEWRIGHT: That's a different issue --

MR. ALLEN: -- I pledge 400,000 to be utilized for the acquisition of the right-of-way currently owned by the Union Pacific. I think it's very material if they can't in fact acquire the right-of-way.

MR. MICKLEWRIGHT: Well, the issue of law and the applicability of federal law versus municipal law is what you want to answer to. In the STB (inaudible-both speaking simultaneously) --

THE COURT: Mr. Micklewright, speak up.

MR. MICKLEWRIGHT: -- (inaudible-both speaking) it's the most logical place for that question to be answered because that's exactly what they do. And I think you've agreed to that.

MR. ALLEN: I don't understand. I --

MR. MICKLEWRIGHT: (Inaudible-both speaking).

MR. ALLEN: Ray, you're not making sense. I don't even comprehend what you've just said.

MR. MICKLEWRIGHT: Well, you had an opportunity to object to our motion to defer and -- (inaudible-both speaking)

MR. ALLEN: To the STB and we said that we think that there are probably legitimate STB issues but we have issues to raise in the STB also.

MR. MICKLEWRIGHT: Okay.

MR. ALLEN: If it's go' -- and nobody has disagreed with what I said which is that the STB procedure allows a reopening or a review based on changed circumstances or new evidence. Certainly evidence that this guy's guarantee is worthless, which we believe it to be, is new evidence that was not before the board when it made its May 2000 order.

MR. MICKLEWRIGHT: Well, it seems to me you have an obligation to take that to the Tenth Circuit not to --

MR. ALLEN: No. We don't -- new evidence would never be something that would be part of the initial appeal from the initial order. If we didn't have that evidence on May 30 and could not have reasonably been expected to have it on May 30, then that would have been part of the appeal. We're not talking about an appeal. That's why the Hobbs Act is utterly irrelevant to this proceeding.

MR. MICKLEWRIGHT: No.

MR. ALLEN: You're the ones who wanted to invoke the jurisdiction of the STB. What you want is the jurisdiction of the STB on a record that's not fully formed, and where you want to be able to say, oh, yeah, yeah, we're still able to operate a railroad.

MR. MICKLEWRIGHT: Well, I will provide, Judge, the information as the current status of the obligation.

THE COURT: Well, let me -- let me, guys -- let me

make just the observation that, frankly, I'm not sure either side is acting properly. But what I am concerned about is I'm trying to come up with a mechanism that will safeguard Mr. Shank's privacy rights in his financial information, whatever those privacy rights may be, but also give the plaintiff a reasonable opportunity to conduct discovery.

And the difficulty that I have is to a certain extent that I have to weigh these in a vacuum because I'm not -- you're not going to bring this issue to me on September 28th, and I can't sit here with absolute confidence and say that under no set of circumstances will this information be at all relevant.

So this is what I'm going to do: First of all, let me make the observation that I think, Mr. Micklewright, when you suspended his deposition, you suspended it improperly. Rule 30 specifically provides -- Rule 30(d)(1) which you refer to in your motion for protective order, it says that a person may instruct a deponent not to answer only when necessary to preserve a privilege -- and that's not being asserted here -- to enforce a limitation directed by the Court -- that's not being asserted here -- or to present a motion under Rule 30(d)(4).

You have not asserted a motion in a timely manner under Rule 30(d)(4). Rule 30(d)(4) says that any time during a deposition on motion of a party and upon a showing

that the examination is being conducted in bad faith or in such manner as unreasonably -- and that's the word that you omit, Mr. Micklewright, in your motion for protective order -- unreasonably to annoy, embarrass or oppress the deponent, the Court may enter an order limiting the scope or manner of the taking of the deposition under 26(c).

At this point, Mr. Micklewright, I think the key question is to what extent is the plaintiff operating in bad faith, and I don't think the plaintiff is operating in bad faith, and then the next question is to what extent is the disclosure of this information going to unreasonably annoy, embarrass or oppress the deponent or party.

Now, based on what I've heard, at least at this juncture, I don't see that a question with regard to Mr. Shank's ability to honor the guarantee, his financial ability to honor the guarantee, is going to either annoy, embarrass or oppress him unreasonably.

MR. MICKLEWRIGHT: Well, I think he was asked that question and he answered it. He said no, he didn't have the ability to make that payment.

THE COURT: Okay. Then, Mr. Allen, what further questions would you propose to ask?

MR. ALLEN: That may be it.

THE COURT: Well, then, why do you have to ask it again?

MR. ALLEN: Because I wanted current. When we go in in front of Judge Babcock on Friday of this week, I want to be absolutely current. That hearing is going to probably form the basis for the referral to the STB. And, as I understand it from Carl Morrell (phonetic), who is the expert in STB law, with whom I'm consulting in Washington, D.C., and who is my adversary in the Phillips litigation over the Roaring Fork branch of the D&RG, the factual structure that's submitted to the board in this 1336(b) referral by the district court is what the board is going to deal with.

THE COURT: Mr. -- Mr. --

MR. ALLEN: It's important we get the facts right.

THE COURT: Mr. Micklewright, the problem that I've got is this: Your client on August whatever said that he didn't have the financial wherewithal to comply with the guarantee.

MR. MICKLEWRIGHT: Right.

THE COURT: Now, Mr. Allen's going to come waltzing into court at the end of this week and he's gong to cite that excerpt from the deposition to Judge Babcock.

MR. MICKLEWRIGHT: Right.

THE COURT: Now, if your client, either directly or through you, stands up in court and says, "Well, no, Judge, that's not true; we do have the ability to do it right now,"

why should Mr. Allen be saying that?

MR. MICKLEWRIGHT: We're not going to do that.

THE COURT: All right. So your client intends to get up in court or you intend to represent to the Court on the end of this month, this Friday, that your client does not have the ability to honor the guarantee?

MR. MICKLEWRIGHT: That's correct.

THE COURT: All right. Then what more do you need, Mr. Allen?

MR. ALLEN: That does it.

THE COURT: There you go. You don't need to take this man's deposition because he's just stated in court as an officer of the court that there has been no change in circumstances, that Mr. Shank does not have the ability to honor the guarantee today any more than he had last month, and he doesn't have the ability and won't have the ability at the end of this week. So, Mr. Allen, we've resolved your problem, as I understand.

MR. ALLEN: Well, I think for what it's worth, Your Honor, that we're entitled -- they're the ones who raised STB jurisdiction, they're the ones who raised the (inaudible-both speaking) --

THE COURT: Well, Mr. Allen --

MR. ALLEN: (Inaudible-both speaking) railroad (inaudible-both speaking), I think we're entitled to inquire

into whether there's been fraudulent representation made.

THE COURT: No, no. Listen. The bottom line is he tells you that right now, and certainly he didn't have it in August, he doesn't have it now, and he won't have it this Friday when you appear before Chief Judge Babcock the financial ability to honor that guarantee.

And you've told me that that's what you were concerned. I've just solved your problem for you.

MR. ALLEN: Well, I think we've solved part of the problem.

THE COURT: Well --

MR. ALLEN: I agree with that. I think that we ought to be entitled in this proceeding because this is, in effect, the fact-finding arm of the STB's 1336(b) proceeding to find out whether or not all these representations about collectibles and all kinds of other stuff that relate --

THE COURT: See, now, Mr. Allen, you're shifting targets. You came to me because you said you wanted to ask questions about Mr. Shank's personal finances. I have now told you that's no longer an issue. You're not satisfied with that response, you now want to change the playing field --

MR. ALLEN: No, I'll take what -- I'll be happy to take what I've got. I don't' want to be heard to be turning it down.

THE COURT: No, but what I'm saying is you're also being heard to want more than that. You filed a motion saying you --

MR. ALLEN: Right.

THE COURT: -- wanted to depose him on his personal finances. I just told you, based on the representations made by Mr. Micklewright, you don't need that anymore.

MR. ALLEN: That's true.

THE COURT: Okay. So then basically your motion is, as far as I'm concerned --

MR. ALLEN: It's moot based on what amounts to a stipulation or a recommendation on the record that --

THE COURT: That's right. He doesn't have --

MR. ALLEN: -- (inaudible-both speaking). I'd still like to know the status of what's happened with the Union Pacific.

THE COURT: Well, that may be, Mr. Allen, but you're not going to get it because you didn't put that in your motion. It's that simple.

MR. ALLEN: Well, I could call up Mr. Obal (phonetic) at the Union Pacific (inaudible) --

THE COURT: You can do whatever you want.

MR. ALLEN: -- (inaudible-both speaking) will tell me.

THE COURT: You can do whatever you want consistent

with the Rules of Civil Procedure and the Code of Professional Responsibility, but what I'm telling you is is defendant moved for protective order to preclude a deposition or a questioning of Mr. Shank on his personal finances. You filed in opposition and said that it was vitally important to you and your client to know whether or not Mr. Shank had the financial wherewithal to perform under the guarantee, because you were particularly concerned in terms of, quote-unquote, making a record at the hearing on September 28th.

MR. ALLEN: Correct.

THE COURT: Now, I have just -- you've gotten a representation from Mr. Micklewright that Mr. Shank does not today have the financial wherewithal to honor the guarantee and will not have the financial wherewithal to honor the guarantee as of September 28th. So you will be able to go into Chief Judge Babcock's courtroom on September 28th and make that factual representation. So the whole premise for your concern to reopen the deposition is now moot.

THE COURT: Well, Your Honor, you'll recall I also in the deposition notice, which is part of the proceedings before you, also said that we wanted briefly to ascertain the current status of matters touched on in prior deposition testimony regarding --

THE COURT: No. The short answer to that is no.

MR. ALLEN: Okay.

THE COURT: The short answer is you can represent to the judge what the information in the deposition revealed. You can advise the judge that -- the Court can only operate under the most current information and this is the most current information. And if Mr. Micklewright comes in and makes representations and you think you're being sandbagged, then you can advise the Court of that. I'm not saying there's --

MR. ALLEN: As I understand it, Mr. Shank is going to be there, and I suppose that, if Judge Babcock wants to, he can put him under oath and asked him himself or (inaudible).

THE COURT: Well, you can deal with Judge Babcock on that question. I'm not going to presume to anticipate how this thing's going to go. But at this point, I'm going to grant the defendants' motion for protective order and order that the deposition of Mr. Shank not be reopened based upon the factual representations made by counsel on the record to the effect that Mr. Shank does not now have the financial wherewithal to honor the guarantee and does not expect to have the financial wherewithal to honor the guarantee as of September 28th.

Anything further?

MR. ALLEN: Let me just ask a housekeeping

question. How do I go about getting the ruling that you've just made transcribed most efficiently so that we shall have it available when we see Judge Babcock?

THE COURT: As far as I'm concerned, you can order a transcript from Avery.

MR. ALLEN: Avery is still doing it?

THE COURT: Yes.

MR. ALLEN: Okay. So talk with them?

THE COURT: Yes.

MR. ALLEN: Okay. That's great.

THE COURT: Anything else, Mr. Micklewright?

MR. MICKLEWRIGHT: No, sir.

THE COURT: All right. Thank you, gentlemen.

MR. ALLEN: Thank you, Judge.

(Whereupon, the within hearing was then in conclusion at 9:10 a.m. on September 24, 2001.)

I hereby certify the foregoing is a correct transcript, to the best of my knowledge and belief (pursuant to the quality of the telephonic connection), from the record of proceedings had in the above-entitled matter.

Shirley J. Woods — 9-24-01

Signature of Transcriber — Date

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 01-B-318

CITY OF CREEDE,
Plaintiff,

vs.

DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION, a Colorado Not-For-Profit corporation and DONALD H. SHANK,
Defendants.

REPORTER'S TRANSCRIPT
HEARING ON MOTIONS

Proceedings before the HONORABLE LEWIS T. BABCOCK, Chief Judge, United States District Court for the District of Colorado, commencing at 4:00 p.m., on the 28th day of September, 2001, in Courtroom C-204, United States Courthouse, Denver, Colorado.

APPEARANCES

FOR THE PLAINTIFF: GEORGE M. ALLEN, ESQ.
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FOR THE DEFENDANTS: RAYMOND P. MICKLEWRIGHT, ESQ.
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Proceedings Reported by Mechanical Stenography
Transcription Produced via Computer

THE COURT: Please be seated.

01-B-318, City of Creede vs. Denver & Rio Grande Railway Historical Foundation and Donald Shank, defendants.

Counsel, would you enter your appearance, please.

MR. ALLEN: May it please the Court, George M. Allen of Telluride, Colorado, on behalf of the City of Creede. With me at counsel table, your Honor, I would like to introduce B. J. Meyers, she is the mayor of Creede.

THE COURT: Thank you.

Mr. Micklewright.

MR. MICKLEWRIGHT: For the record, my name is Ray Micklewright. Seated to my right is Mr. Shank, who appears individually and as a representative of the Denver & Rio Grande Railway Historical Foundation, who I shall refer to simply as "the foundation."

THE COURT: As I understand it the pending motion is to refer issues to the Surface Transportation Board and for a stay pending resolution of those issues.

I think it's Mr. Micklewright's motion.

MR. MICKLEWRIGHT: That's correct.

THE COURT: I also understand that there is really no dispute that the matter will at some juncture be or is already referred to the STB. Is it now under referral?

MR. MICKLEWRIGHT: No, sir.

MR. ALLEN: No, your Honor.

THE COURT: But there is no dispute but that it should be referred.

MR. ALLEN: Our view, your Honor, is that at some point -- and I want to draw a distinction between the matter --

THE COURT: I understand. The issues -- well, go ahead.

MR. ALLEN: Right. Our view is that this Court and I think the 1336 law makes pretty clear retains plenary jurisdiction of this case, but we agree that certain issues and questions should be referred to the STB, because it has exclusive jurisdiction of some of the issues in this case.

THE COURT: So the question is how you frame the issues?

MR. ALLEN: Exactly.

THE COURT: And the question is whether or not we stay discovery pending that referral.

MR. ALLEN: Exactly. Right. Let me inquire. Did the Court receive the piece of paper I filed this morning?

THE COURT: I did. I read it.

MR. ALLEN: Okay. Well, I think that sets forth our position.

THE COURT: And I think, Mr. Micklewright, you are the party seeking the stay, so I'll go ahead and I'll take your argument first.

DEFENDANTS' ARGUMENT

MR. MICKLEWRIGHT: When this case was originally filed in Mineral County I was under the impression that in a sense both the concerns of the foundation and Mr. Shank and the city were aligned in some fashion, because each party had an interest in determining the extent of both the municipal zoning authority for the City of Creede and to the extent that that authority might be preempted by federal law.

It seemed clear at the beginning that this was ripe for a decision by the Surface Transportation Board, so our goal was to have this matter in federal court and then have the court under primary jurisdiction ultimately refer this matter to the STB.

I believe that for the most part, despite the fact that some of the discovery questions seem to go to the issue of challenging the offer of financial assistance that my client submitted to the Surface Transportation Board was ultimately approved by the board and ultimately a deal was struck between my client and the Union Pacific for acquisition of the line to be abandoned.

On August 2d, I believe, I received during Mr. Shank's -- or prior to Mr. Shank's deposition a brief from the plaintiff that essentially said that, We want to be able to take discovery in this case, because if we were to present the issues that this case is really about, which are not zoning,

but are really addressed toward the offer of financial assistance made by my client to the STB, they would generally not get discovery. And I thought it was interesting that at page 6 of the initial brief counsel noted that, "Generally the board does not view these types of proceedings as adversarial. As the board's predecessor, the ICC, pointed out in **Advantage Tank Lines, Inc. vs. Ex-Pipeline Movements**, and that's 10 I.C.C. 2d 64, at page 66, a 1994 case: 'The purpose of a declaratory order is simply to remove uncertainty as to the legal effect of the fact pattern, as we understand it, presented by the party requesting the declaration. It is not a verification of those facts nor does it apply to any different circumstances.'"

In the Case Management Order it is very clear what is at issue in this case. It says, as follows:

"Plaintiff claims its 1972 residential zoning is applicable to all of the former Denver & Rio Grande Western Railroad right-of-way in that part of the City of Creede known as South Creede except for the area occupied by the railroad tracks themselves and a single side clearance extending 12.5 feet to either side of the centerline of the tracks. Thus, Creede's claim is that except for a 25 foot wide strip on which the tracks are centered, all of the foundation's right-of-way in South Creede is subject to Creede's residential zoning."

Now what makes that somewhat complicated is the fact

that none of the discovery has gone to the issue of zoning. It has all gone to the offer of financial assistance.

Clearly that discovery and the purpose of this litigation is then for what we would consider to be an improper purpose.

First of all, I need to make several distinctions in the procedural history of this case. Once Mr. Shank filed his offer of financial assistance for consideration by the Surface Transportation Board, they evaluated that information and made a determination that it was bona fides, as it did with respect to another offer of financial assistance for the same track.

What then happens is under 28 U.S.C. 2344 the parties have a right to appeal from the administrative order of the Surface Transportation Board. The plaintiffs from this action did not file an appeal from that action, so whatever rights they had to protest the bona fides finding of the offer of financial assistance was lost. But all was not lost.

49 U.S.C. Section 722 provides for reconsideration of board action. And simply all the plaintiff needed to do in this case is to say that -- whatever their position is in this case, which is that Mr. Shank's offer of financial assistance is indeed not bona fides, present evidence to the board and let them determine whether or not in a petition for rehearing they are going to open and evaluate the matter.

Again, there are specific rules and regulations that

relate to that. 49 C.F.R. 1115.3 is the procedure and spells out the proper forum for these attacks on the offer of financial assistance, as does 49 C.F.R. 1115 -- excuse me, 1115.4. And that says when these petitions can be filed.

And the truth of the matter is these petitions can be filed any time that the plaintiff in this case thinks there's sufficient evidence to allow for an attack on the offer of financial assistance.

THE COURT: You start with the proposition that I have plenary jurisdiction.

MR. MICKLEWRIGHT: Yes.

THE COURT: And that petition can be filed at any time that the plaintiff believes there is sufficient evidence to do so?

MR. MICKLEWRIGHT: That's correct.

THE COURT: Doesn't that argue in favor of continuing the discovery in this case at this time?

MR. MICKLEWRIGHT: No.

THE COURT: Why not?

MR. MICKLEWRIGHT: First of all, what does the Court retain plenary jurisdiction over? And I believe the question that the Court retains plenary jurisdiction over is the issues that are framed by the Complaint. If the Complaint is as I have articulated it from the Case Management Order, then it has nothing to do with the offer of financial assistance --

THE COURT: Well, isn't there -- I mean the ultimate issue for the city is a question of zoning authority, regulatory authority of the city, correct?

MR. MICKLEWRIGHT: Correct.

THE COURT: And doesn't that implicate the extent of any right-of-way that may inure to the benefit of the defendants?

MR. MICKLEWRIGHT: Correct.

THE COURT: And doesn't that implicate the petition that would be filed?

MR. MICKLEWRIGHT: Well, I think we need to sort out different issues. The Union Pacific had a right to the right-of-way that remained uncontested until it decided it would abandon the rail line. To the extent that there were zoning issues that needed to be addressed or could have been addressed, they were not, for whatever reason. And, frankly, the reason was that the Union Pacific didn't run the rail line. When they decided to abandon it, my client decided that he had an idea that what he could do was create a rail carrier for freight. And fundamentally the city says, We don't want that to happen.

So if you look at it from what the Court retains plenary jurisdiction over, the first layer is what is the friction between competing regulatory authorities, municipal versus federal. The second is do we even want to look at in

necessarily the case. Let me sort of recast your question in a way that may or may not answer your question. But let's assume that had the Surface Transportation Board said to Mr. Shank, We don't believe you've got the wherewithal to pull this off. We don't find that your offer is acceptable. Union Pacific, you can either continue with your abandonment or withdraw it at this point in time. If the Union Pacific withdrew their abandonment, then the question would be, in the context of this dispute, what would be the significance of my client's financial wherewithal or the wherewithal of the Union Pacific in trying to determine which regulatory scheme gets to control the right-of-way and to what extent.

And what I'm trying to I guess imply is that the financial condition, not only of my client, but of the Union Pacific is irrelevant with respect to the clash of zoning regimes. And what I am trying to say is what these folks are trying to do is to simply -- I think the fundamental purpose is they don't want a train. They don't want Creede to be like what they have in Durango.

THE COURT: Well, I suppose what they would like ultimately to accomplish is an abandonment by the DRG.

MR. MICKLEWRIGHT: That's true. And I guess my answer to that is let us perform -- what they are doing now is using the guise of a zoning dispute to run my client into the ground and to prevent him from going forward with trying to comply

with that which he has agreed to accomplish.

Now if they just simply --

THE COURT: Well, your predicate there is that it is a ruse, but an interest in zoning is a valid municipal interest.

MR. MICKLEWRIGHT: I agree. And not only do I agree with that proposition, but I agree that there is a clash with respect to the municipal regulatory authority and the federal authority. And, frankly, who's best to handle that? Is it the Surface Transportation Board? Yes, I think so.

THE COURT: And ultimately the question is what you give them to handle it.

MR. MICKLEWRIGHT: Right.

THE COURT: And that's why we're here as to whether or not there ought to be a stay of discovery.

MR. MICKLEWRIGHT: Right. And I'm saying that if there is a procedure before the Surface Transportation Board to attack the offer of financial assistance, then let them do that with the Surface Transportation Board rather than running the ruse of a zoning ordinance dispute through this litigation in order to get discovery that they would not otherwise be entitled to get under the Surface Transportation Board's proceedings. Maybe they'll get it, maybe they won't. But I think one of the things that the Surface Transportation Board ought to be entitled to do is to defend its order that in fact Mr. Shank's offer of financial assistance was bona fides. He

is not in default under the terms of that agreement with the Union Pacific.

So essentially what we have then, if the Court retains plenary jurisdiction and the plaintiff gets their way, is that we have discovery going to the issue of my client's financial ability to carry out the terms of the offer of financial assistance and his agreement with the Union Pacific, when the Surface Transportation Board itself may say, We don't think that's a legitimate issue for us to have. One of the things the Court could easily do is simply dismiss this action and say to the plaintiffs, If you've got a concern about the offer of financial assistance, then take it to the Surface Transportation Board. The statute says -- or the regulation says that you are entitled to bring this action any time as long as you've got some legitimate evidence.

Now we have been more than cooperative with the plaintiffs in this action with respect to discovery and making information available that is wholly irrelevant to anything to do with the zoning issues in dispute. So I think that the issues that we framed in our June 12th submittal to the Court, the two questions that we ask the Court to refer to the Surface Transportation Board ought to be the ones that you submit.

Or I think the easier alternative possibility would be to simply dismiss this action and let them proceed on the merits of their claims that my client has somehow defrauded the

Surface Transportation Board in presenting his offer of financial assistance to the Surface Transportation Board.

I don't think that's true. I don't think the Surface Transportation Board will find that to be true. But at least we ought to let them answer that question in the proper mechanism that exists for the resolution of that kind of dispute.

THE COURT: Okay.

Mr. Allen.

PLAINTIFF'S ARGUMENT

MR. ALLEN: Thank you, your Honor.

May it please the Court:

First, I'm bemused by Mr. Micklewright's statement that they have been more than cooperative in making evidence available. When Judge Ogborn was in a matter of hours of ruling on our motion to take Mr. Shank's deposition in the state court proceeding back in February, they removed it to this Court, I presume to avoid that hearing, where I think the outcome of the hearing was inevitable that we would have been able to take Mr. Shank's deposition. We have taken his deposition because we prevailed in motions before Magistrate Judge Shaffer to take the deposition.

There has never been cooperation. And in fact we were proceeding before Magistrate Judge Shaffer on Monday of this week seeking further deposition testimony which they managed to

avoid only by stipulating that Mr. Shank is unable to perform on his $400,000 guarantee of the obligations of the foundation to the Union Pacific for acquisition of the right-of-way.

THE COURT: When is discovery scheduled to close?

MR. ALLEN: Discovery is scheduled to close per the scheduling order, your Honor, on November 16. And that is a time line that we can make based on the deposition notices that I sent to Mr. Micklewright yesterday for several more witnesses.

The only complicating factor in that, your Honor, is that I'm scheduled to have both knees replaced with prostheses in Aspen the week after next, and I'm assuming that I will recover per the schedule my surgeon thinks I will.

I want to go back, if I may, your Honor, to this Court's order denying remand. That's one I lost. I asked that this case be remanded to the state court. Your Honor will recall that your Honor found federal jurisdiction on the basis of in effect inverting the posture of the parties and determining that for purposes of federal jurisdiction in effect the Court would look at this as though this had been a case brought by the railroad foundation, Mr. Shank's foundation, against the City of Creede to prevent Creede from using its zoning to interfere with railroad operations. And the Court found that if the case had been brought that way rather than as a declaratory judgment proceeding, that there would have been

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unquestioned federal jurisdiction for that litigation. That would have been in effect the same posture as, for example, the Florida East Coast City of West Palm Beach case where the railroad brought an action to try to determine that the city zoning was being improperly applied to it.

If this case had been brought in that posture and the Court determined federal jurisdiction and we did not disagree with that, we said, All right, good enough, we'll proceed in federal court and accept that there is federal jurisdiction, if the Court had determined -- rather, if Mr. Shank and his foundation had come into this Court and said, We're a railroad, we have the right to be a railroad pursuant to this offer of financial assistance which has been approved by the director of the Surface Transportation Board, we without doubt would have been entitled in our pleadings or by way of a 12(b)(6) motion to say, No, you're not a railroad, and the reason we think you're not a railroad is the following, which is in essence the posture in which we now found ourselves: (1) You're not operating trains. So in that regard you don't look like a railroad. Furthermore, the right-of-way on which you claim to be a railroad hasn't had any trains operating on it since 1985 and it hasn't had any trains operate to within the City of Creede since 1972. So you are implausible in your contention that you're a railroad.

Furthermore, we now know, based on what we have

developed in this case, that the foundation which made representations to the STB -- and I'm holding in my hand the STB decision of April 22, 1999, in which it specifically relied on the financial representations of Mr. Shank and his foundation.

They made representations regarding financial capability to operate this railroad. Those were unchallenged in that proceeding. I agree with Mr. Micklewright that there is a framework within regulatory law for filing a challenge with the STB as a matter of initial jurisdiction to the continued OFA rights. I want to draw a distinction, however, between that type of a challenge which the board would have discretion to hear or not hear and the type of proceeding in which we are now engaged. What we're talking about now is not a matter on which the board will have any discretion. The board in a 1336(b) referral from a district court has no discretion not to hear it. They are in effect your servant. And it will be your referral, it won't be Mr. Shank's referral or my referral or my client's referral, it will be this district Court's referral of questions or issues.

That will lead to in the proceedings of the board a declaratory order proceeding, which as Mr. Micklewright recognizes, citing the same case we cited in our initial filing on the referral issue, the **Advantage Tank Lines** case, is one where the Surface Transportation Board will take the facts as

in effect prescribed to it by the district court. The board will not engage, according to **Advantage Tank Lines** and according to the understanding which I referenced I had when I conferred with the board's staff in Washington in May of this year, the board isn't going to carry out fact finding in all likelihood. I can't say never, because, who knows, maybe they will. But as the lawyers with whom I've consulted in Washington, who are more expert than I in these matters, point out that once upon a time the Interstate Commerce Commission had nearly a thousand administrative law examiners and hearing examiners and the STB is now down to a handful of such slots. So they're not really a fact-finding body. They will take the facts as given to them by the district court and they will conduct a 1336(b) determination or a determination pursuant to the 1336(b) referral.

THE COURT: Does that require that I enter findings of fact?

MR. ALLEN: Your Honor, I think we're in an area where it doesn't require it, but it would be highly desirable, because if you don't enter findings of fact -- what we've seen here is we have a factually controverted matter. It's not as though everybody agrees what the facts are. We take the position that there is no financial ability to carry out the responsibilities of operating this. And the foundation, Mr. Shank says, Oh, no, it's much cheaper than you say it is --

THE COURT: If I were to enter findings of fact that virtually compel a conclusion of no financial ability, why have the STB be involved at all?

MR. ALLEN: The only reason I can say for why is that under the doctrine of primary jurisdiction and based on the decisional law and most of the circuits that have passed on it, we seem to be confronted with a body of law construing the APA that says they and not you have jurisdiction to terminate OFA rights or to determine abandonment.

THE COURT: Well, my concern is that I would in some way usurp the function of the STB. And by that I mean what I think you are attempting to do here is to develop a record that you could present, contested or not, to the STB to let them draw their conclusions from that record.

MR. ALLEN: I plead guilty. I mean that's absolutely correct. I think that --

THE COURT: But short of my actually finding issues of disputed fact.

MR. ALLEN: I don't think -- there's no authority I know of, your Honor, that tells us one way or the other what the boundaries or edges of the envelope are, if you will, on what a district court can and cannot do in shaping the 1336(b) referral.

I mean I think I'm the lawyer who was here at the inception of the last 1336(b) referral that came from this

district. That was Judge Weinshienk's in the Phillips case in the Roaring Fork Valley. And in that case I learned to my chagrin that by not having gotten the facts well formed before having gotten to the STB, we became prisoners of an incomplete record in the district court, which became the record in the -- rather, the ICC, which this was a pre-ICCTA case, the ICC Termination Act of 1995. And my attempts in that litigation to use the ICC, and then the STB came into being as that process went on, were utterly fruitless. I was told, No, you know, we're not interested in more affidavits, more findings, more fact findings, carrying out discovery, sending a hearing examiner, sending somebody out to investigate. It's very interesting that you filed all these affidavits that say that the rail line hasn't been used, and there are landslides, and mudslides, and so forth. They just tossed it all out. They said they didn't consider it. And that was that. So I learned to my chagrin that you better use the district court to develop the facts, because if you don't, you're not going to find a receptive audience in Washington to doing a lot of fact finding.

THE COURT: Yeah. The question I have in my mind is how do you define -- develop the facts. I mean there's a difference between developing information by way of, for example, the deposition to submit to the STB and developing the facts as adjudicated. And my concern is that latter step.

MR. ALLEN: I don't think we have to go to that latter step. In a perfect world I would like to, but --

THE COURT: Yeah. I am reluctant to take it, that latter step.

MR. ALLEN: I appreciate that. And I think we're simply in a gray area. I don't think anything has defined what these contours are. It's interesting, your Honor, that the board in its **Borough of Riverdale** case, which is in the many materials cited to you, which is a recent decision, that's March of this year, in the **Riverdale** case cited with approval the decision -- the initial decision of the District Court in the West Palm Beach case. Now West Palm Beach is a case that never went to the board. It's pending in the Eleventh Circuit right now after the district court from the Southern District of Florida found that a 21-acre concrete loading facility was not integral to the operation of the Florida East Coast Railroad and, therefore, the City of West Palm Beach could apply its zoning and noise controls and so forth to this rather large concrete loading facility.

So with due respect to everybody who has been writing opinions, whether it be district courts, courts of appeal or the board itself, I think the law is all over the place, and I can't tell you where the -- where the contours are. I can tell you where I would like them to be. But at a bare minimum what seemed to me and to my client to be of very great importance is

to utilize the discovery window we have in this case and to take the depositions that we have scheduled, those are as -- and we provided your Honor with a copy of the notice and I've described it in our filing today, what we need to go into, which is to get a determination -- or at least get facts on which a determination could be made whether or not the obtaining of the OFA rights is based on either misrepresentation or fraud in what was submitted to the STB.

I want to say one more thing, and that is I view the references to the Hobbs Act, 28 U.S.C. 2344, as a colossal red herring. We're not talking here about something that had anything to do with the rights of the City of Creede in the initial OFA proceedings to take an appeal to the Tenth Circuit. I mean, I agree, Creede would have had a right to appeal to the Tenth Circuit, but the fact that Creede did not know at that time and did not have means of knowing that the financial representations and the competence representations that were made to the board, and which the board accepted, both in its April 1999 order and in its -- it's May 2000 order, the fact that Creede didn't know that those representations were either materially misleading or outright fraudulent does not deprive Creede of the right to have an adjudication now that Creede is in possession of these facts. And since we're in possession and since we already have a record that tends to indicate in I think a very substantial way that there's very substantial

doubt about the competence and ability of the foundation to ever institute rail service -- I mean Mr. Shank's deposition testimony on June 21 was that they would not have rail service going by Memorial Day 2002. Memorial Day 2002 is the two-year window by which the STB presumes by its regs and regulatory law that there will be interstate rail service. The initial abandonment exemption application filed by Union Pacific, which contained an environmental assessment under NEPA, stated that Union Pacific did not believe that there was any shipper demand for rail service.

In Mr. Shank's June 21 deposition, he could not describe a single shipper who had any need for rail service. In the board's decision -- ultimate decision in the **Roaring Fork** case in 1999 the board said that its procedures, meaning specifically its OFA procedures, because that was an OFA proceeding, cannot and should not be used to frustrate other lawful operations of law.

Now the critical operation we're concerned with are the reversionary rights that exist under 43 U.S.C. Section 912. Under Section 912 Creede is a reversionary party. So unless -- if there's an abandonment, unless there's a rails-to-trails conversion, which so far has not loomed on the horizon, Creede stands to have the reversion. If that doesn't take place, we're looking at having to deal with someone who even though he's not operating a train, even though he doesn't look like

ever having any competence to engage in interstate carriage of freight by rail, nevertheless stands to become the owner of 40 percent of the commercial real estate of the town of Creede with enormous adverse impact on Creede.

The papers before the Court, your Honor, that have not been challenged already show it has adversely impacted real estate closings in Creede, adversely impacted business, people have effectively had their titles clouded because of the uncertainty that's generated by this circumstance.

So we're in very much the posture of mountain communities that are confronted by people who want to come in and get unpatented mining claims under the 1872 Act and use those as a pretext for real estate development rather than mining. We're looking at someone who wants to use OFA rights purchased for a couple of hundred thousand dollars, with no intent, no capability of ever operating freight rail service and, frankly, based on what we see, very little prospect of running a tourist train either, to go into the real estate leasing business.

That is from Creede's point of view enormously disruptive and anathema and it flies in the face of the rail regulatory decision law that has come from both the ICC and the board that construes the OFA proceedings and says, You can't use these as a subterfuge to frustrate what would otherwise be legitimate legal processes.

In the **King County** case, for example, which we cited, up in Seattle where they did the OFA, then the day after they did the OFA, they did a rails-to-trails conversion with the right-of-way with no attempt to operate a railroad. The board revoked those OFA rights and said, No, you can't do that. You can't use the OFA process as a subterfuge to frustrate what would otherwise be lawful processes.

What we want to do here, your Honor, at a minimum is keep the discovery going through the discovery cutoff, which is November 16. We've noticed depositions for the time period in early to mid November.

And I will say this, Mr. Micklewright and I, notwithstanding our disagreement on a lot of things, have had a great working relationship on working out scheduling. He's a consummate professional, and I really appreciate that. I hope he would say the same of me.

We want to carry out discovery to get the information established in order that when this matter goes to the STB, it goes based on a record that's usable, because I don't think the STB is going to develop a record.

THE COURT: Thank you.

MR. ALLEN: Thank you very much.

RULING

THE COURT: What I am going to do this: I am going to deny the motion to stay discovery. We are on the eve of the

close of discovery. It seems to me that I begin with the proposition that under this action as filed here, as clearly pointed out by Mr. Micklewright, this Court has plenary jurisdiction over this case. And the posture that the case now exists is one that I think controls the analysis. Being virtually on the eve of close of discovery, I think discovery should proceed until completed.

Mr. Micklewright argues that this case is merely a ruse to obtain that discovery. And I think that is advocacy to utilize the word "ruse," but I think "ruse" in this case more properly should be translated to a strategy, and it is an appropriate strategy, given the plenary jurisdiction of this Court, the case being as it is now postured before me.

Put it another way, with somewhat of a blunt instrument: There's more than one way to skin a cat.

I am not of the view that it would be appropriate for me to make findings of fact to resolve disputed issues of fact. But the STB under the posture here, it being conceded that there must be a referral of issues, will be required to make a decision, and the decision is one which ultimately will aid in the determination of the underlying merits of the case.

Now the question remains as to the definition of the issues for referral. And I think at this point it is premature to define those issues for referral. At the close of discovery -- within 20 days from the close of discovery I am

going to direct that counsel file their statement of the issues to be referred. One could hope that at least in some respect those issues could be agreed, but I know that the devil is in the details and that is not likely. However, what counsel can do is make an effort so far as you can to define the issues for referral. I think it would be possible for you to hone them so that the issues could be stated in a way so that, for example, in issue number one -- this is possible, I don't know that this will occur, but there may be some alternate language contained within an issue, although there's some agreed language within it as well. So it's somewhat like I invite the submission of instructions to the Court. What I ask for in an instruction, if it is agreed, it simply comes to me. If there is language in that instruction that is disputed, the plaintiff's language appears in caps and the defendant's language appears in brackets. Now if I see, for example, here an issue where there is no caps and no brackets, I know that it is an agreed issue. If I see an issue that is all in caps, I know that that's what the plaintiff wants to refer and the defendant doesn't. If I see an issue in which part of the language is in caps followed by language in brackets, I know that the parties are submitting alternative language to it. And I think you can structure something along those lines for me.

So I will deny the motion for a stay. And we'll look for your statement of issues for referral. And I think if you

want to supplement that by a ten-page memorandum in support of your proposed language, I will permit that and entertain that short memorandum brief.

All right. Anything further this afternoon?

Good thing they're not operating on your brain.

MR. ALLEN: You know, once you're under anesthesia, you really don't know.

THE COURT: Well, good luck with your surgery.

All right. We'll be in recess.

MR. ALLEN: Thank you. I want to thank the Court for scheduling this on Friday afternoon. I live on the Western Slope and it's always easier to have them on Mondays and Fridays. I don't know if that was deliberate.

THE COURT: Well, sure. You know, I used to practice out in the country. I understand that.

We will be in recess.

(Proceedings concluded at 4:44 p.m.)

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REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated at Denver, Colorado, this 22d day of January, 2002.

Gwen Daniel, CM, CFRR

FILED
United States District Court
Denver, Colorado
OCT 1 2001
JAMES R. MANSPEAKER, CLERK
By _____ Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Lewis T. Babcock, Chief Judge

Civil Action No. 01-B-318

CITY OF CREEDE, a Colorado Municipal Corporation,

Plaintiff,

v.

DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION, a Colorado Not-For-Profit Corporation, and DONALD H. SHANK

Defendants.

ORDER

After consideration of Defendants' pending motion for referral of issues to the Surface Transportation Board and for stay pending resolution of such issues and counsels' arguments and for the reasons stated on the record during the September 28, 2001 hearing, which are incorporated into this Order, IT IS ORDERED that:

1) Defendants' motion for referral of issues to the Surface Transportation Board and for stay pending resolution of such issues is GRANTED as to the referral of issues to the Surface Transportation Board. The referral is DEFERRED pending definition of the issues to be referred. The motion is DENIED as to a stay pending resolution of such issues; and

2. Within 20 days from the close of discovery, the parties SHALL FILE their

proposed statement of issues to be referred to the Surface Transportation Board. The parties may file supplemental briefs of no more than ten (10) pages in support of the proposed issues to be referred.

Dated: September 24, 2001 in Denver, Colorado.

BY THE COURT:

LEWIS T. BABCOCK, CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CERTIFICATE OF SERVICE

Civil Case No. 01-B-318

The undersigned certifies that a copy of the foregoing Order was served on October 1, 2001, by:

(X) delivery to:

Magistrate Judge Craig Shaffer

(X) depositing the same in the United States Mail, postage prepaid, addressed to:

W. Randolph Barnhart, Esq.
Hillyard & Barnhart, L.L.P.
7887 East Belleview Ave., Suite 1200
Englewood, CO 80111

George M. Allen, Esq.
206-A Society Drive
Telluride, CO 81435

Raymond P. Micklewright, Esq.
Wolf & Slatkin, P.C.
44 Cook Street, Suite 1000
Denver, CO 80206-5827

Geneva D Matte
Deputy Clerk

FILED
U.S. DISTRICT COURT
DISTRICT OF COLORADO
2002 MAR 27 AM 10: 17
JAMES R. MANSPEAKER
CLERK
BY _____ DEP. CLK

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Honorable Robert Blackburn
United States District Judge

Honorable Craig B. Shaffer
United States Magistrate Judge

CITY OF CREEDE,
a Colorado Municipal Corporation,

Plaintiff,

-vs-

DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION,
a Colorado Not-For-Profit Corporation
and DONALD H. SHANK,

Defendants.

CIVIL ACTION NO. 01-RB-0318

EXHIBIT C TO PLAINTIFF'S SUBMISSION FOR MARCH 27, 2002 STATUS CONFERENCE

Plaintiff, by its attorney, George M. Allen, hereby submits Exhibit C to Plaintiff's Submission For March 27, 2002 Status Conference.

Respectfully submitted,

George M. Allen,
Counsel for Plaintiff

206-A Society Drive
Telluride CO 81435
Telephone: 970-369-1000
Facsimile: 970-369-1009
Email: alnoma@yahoo.com

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address):
MARIAN L. STANTON
St. Bar #98007
STANTON LAW CORPORATION
16530 Ventura Blvd. Suite 205
Encino, California 91436-4589
TELEPHONE NO.: (818) 906— 2877 FAX NO.:
ATTORNEY FOR (Name): Petitioner: Gayle Ann Shank

FOR COURT USE ONLY

FILED
LOS ANGELES SUPERIOR COURT
MAY 10 2001
JOHN A. CLARKE, CLERK
BY CARMEN MEHAFFIE, DEPUTY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
STREET ADDRESS: 111 NORTH HILL STREET
MAILING ADDRESS: 111 NORTH HILL STREET
CITY AND ZIP CODE: LOS ANGELES, CALIFORNIA 90012
BRANCH NAME: CENTRAL DISTRICT

PETITIONER: GAYLE ANN SHANK

RESPONDENT: DONALD HERBERT SHANK

CASE NUMBER: BD 332896

NOTICE OF ENTRY OF JUDGMENT

MAY 10 2001

You are notified that the following judgment was entered on *(date)*:

1. [x] Dissolution of Marriage
2. [ ] Dissolution of Marriage - Status Only
3. [ ] Dissolution of Marriage - Reserving Jurisdiction over Termination of Marital Status
4. [ ] Legal Separation
5. [ ] Nullity
6. [ ] Parent-Child Relationship
7. [ ] Judgment on Reserved Issues
8. [ ] Other *(specify)*:

Date: MAY 10 2001

Clerk, by Carmen Mehaffie, Deputy

- NOTICE TO ATTORNEY OF RECORD OR PARTY WITHOUT ATTORNEY -

Pursuant to the provisions of Code of Civil Procedure section 1952, if no appeal is filed the court may order the exhibits destroyed or otherwise disposed of after 60 days from the expiration of the appeal time.

STATEMENTS IN THIS BOX APPLY ONLY TO JUDGMENTS OF DISSOLUTION

Effective date of termination of marital status *(specify)*: 5/10/01

WARNING: NEITHER PARTY MAY REMARRY UNTIL THE EFFECTIVE DATE OF THE TERMINATION OF MARITAL STATUS AS SHOWN IN THIS BOX.

CLERK'S CERTIFICATE OF MAILING

I certify that I am not a party to this cause and that a true copy of the Notice of Entry of Judgment was mailed first class, postage fully prepaid, in a sealed envelope addressed as shown below, and that the notice was mailed

at *(place)*: L.A., California,
on *(date)*: MAY 10 2001

Clerk, by Carmen Mehaffie, Deputy

Gayle Ann Shank
c/o Stanton Law Corporation
16530 Ventura Blvd. #205
Encino, California 91436-4589

Donald Herbert Shank
Respondent In Pro Persona
204 St. Andrews Circle
Durango, Colorado 81301

345

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address):
MARIAN L. STANTON St. Bar #98007
STANTON LAW CORPORATION
16530 Ventura Blvd.
Suite 205
Encino, California 91436-4589
TELEPHONE NO.: 818-906-2877 FAX NO.: 818-501-2021
ATTORNEY FOR (Name): Gayle Ann Shank

FOR COURT USE ONLY

FILED
LOS ANGELES SUPERIOR COURT
OCT 18 2000
JOHN A. CLARKE, CLERK
K. Smith
BY K. SMITH, DEPUTY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
STREET ADDRESS: 111 North Hill Street
MAILING ADDRESS: 111 North Hill Street
CITY AND ZIP CODE: Los Angeles, California 90012
BRANCH NAME: CENTRAL DISTRICT

MARRIAGE OF
PETITIONER: GAYLE ANN SHANK
RESPONDENT: DONALD HERBERT SHANK

CASE NUMBER: BD332896

PETITION FOR
- [X] Dissolution of Marriage
- [ ] Legal Separation
- [ ] Nullity of Marriage
- [ ] AMENDED

1. RESIDENCE (Dissolution only) [X] Petitioner [ ] Respondent has been a resident of this state for at least six months and of this county for at least three months immediately preceding the filing of this *Petition for Dissolution of Marriage.*

2. STATISTICAL FACTS
   a. Date of marriage: 10-26-85
   b. Date of separation: 6-01-99
   c. Period between marriage and separation
      Years: 13 Months: 8

3. DECLARATION REGARDING MINOR CHILDREN *(include children of this relationship born prior to or during the marriage or adopted during the marriage)*:
   a. [ ] There are no minor children.
   b. [X] The minor children are:

Child's name	Birth date	Age	Sex
KRYSTIN JEAN SHANK	7-4-87	13YRS	FEMALE

   [ ] Continued on Attachment 3b.
   c. If there are minor children of the Petitioner and Respondent, a completed *Declaration Under the Uniform Child Custody Jurisdiction Act (UCCJA)* (form MC-150) must be attached.
   d. [ ] A completed voluntary declaration of paternity regarding minor children born to the Petitioner and Respondent prior to the marriage is attached.

4. [X] Petitioner **requests** confirmation as separate property assets and debts the items listed
   [ ] in Attachment 4 [X] below:

Item	Confirm to
All property, both real and personal, and any debts acquired by or incurred by Petitioner, prior to marriage, subsequent to separation or at any time by reason of gift or devise-Confirm to Petitioner;	
All property, both real and personal, and any debts acquired by or incurred by Respondent, prior to marriage, subsequent to separation or at any time by reason of gift or devise-Confirm to Respondent.	

NOTICE: Any party required to pay child support must pay interest on overdue amounts at the "legal" rate, which is currently 10 percent.

(Continued on reverse)

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

RT CASE TITLE	CASE NUMBER
Marriage of Shank	BD332896
	FAMILY AND PROBATE CASE COVER SHEET-CERTIFICATE OF GROUNDS FOR ASSIGNMENT TO DISTRICT

This form is required in all new Family and Probate cases in the Los Angeles Superior Court.

This form is not required in Abandonment, Sole Custody & Emancipation cases. Please file those cases at Children's Court.

I. Fill in the requested information and estimated length of hearing expected for this case:

MINOR CHILDREN INVOLVED? ☒ YES ☐ NO HOW MANY? 1 TIME ESTIMATE: 1 ☒ HOURS/☐ DAYS.

II. Select the correct district (3 steps):

1 Under Column **1** below, check the one type of action which best describes the nature of this case.

2 In Column **2** below, circle the reason for your choice of district that applies to the type of action you have checked.

Applicable Reasons for Choosing District (See Column 2 below)

1. May be filed in Central District.
2. District where one or more of the parties reside.
3. District where proposed ward/conservatee resides.
4. Child is held within the district.
5. District where petitioner resides.
6. District where decedent resided.
7. Decedent resided out of state - held property in District.
8. Child resides or decedent parent's probate would be filed in district.

3 Fill in the information requested on page 2 in item III; complete item IV. Sign the certificate.

-1- Type of Action (Check only one)	-2- Applicable Reasons - See Above
Marriage/Custody/Support Matters	
☒ A5520 Regular Dissolution of Marriage	1., 2.
☐ A5525 Summary Dissolution of Marriage	1., 2.
☐ A5530 Nullity of Void or Voidable Marriage	1., 2.
☐ A5510 Legal Separation	1., 2.
☐ A6135 Foreign Support Order	1., 2.
☐ A6136 Foreign Custody Order	1., 2., 4.
☐ A6137 Reciprocal Enforcement of Support - Initiating Petition	1.
☐ A6139 Reciprocal Enforcement of Support - Registration of Foreign Support	1.
☐ A6122 Domestic Violence Restraining Order (Civil Harassment - use Civil Cover Sheet)	1., 2.
☐ A6600 Habeas Corpus Petition - Child Custody	1., 4.
Other Family Case	
☐ A6080 Determination of Parentage/Paternity (Non-governmental)	1., 4., 8.
☐ A6111 Approval of Minor's Contract (6751 Family Code)	1.
☐ A6130 Other Family Complaint or Petition (Specify):_____	1., 2., 4., 8.
Adoption Matters (Submit Central District Filings at Children's Court)	
☐ A6101 Agency Adoption	1., 5.
☐ A6102 Independent Adoption	1., 5.
☐ A6103 Adult Adoption	1., 5.
☐ A6104 Stepparent Adoption	1., 5.

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SHORT TITLE: Marriage of Shenk	CASE NUM.

-1- Type of Action (Check only one)	-2- Applicable Reasons - See Above
Decedent Estates	
☐ A6210 Petition for Probate of Will - Letters Testamentary	1., 5., 6., 7.
☐ A6211 Petition for Probate of Will - Letters of Administration	1., 5., 6., 7.
☐ A6212 Petition for Letters of Administration	1., 5., 6., 7.
☐ A6213 Petition for Letters of Special Administration	1., 5., 6., 7.
☐ A6214 Petition to Set Aside Small Estate (6602 Prob. Code)	1., 5., 6., 7.
☐ A6215 Spousal Property Petition	1., 5., 6., 7.
☐ A6216 Petition for Succession to Real Property	1., 5., 6., 7.
☐ A6217 Summary Probate (7660 Prob. Code)	1., 5., 6., 7.
☐ A6218 Petition re Real Property of Small Value (13200 Prob. Code)	1., 5., 6., 7.
Conservatorship/Guardianship/Trust Matters	
☐ A6230 Petition for Conservatorship of Person and Estate	1., 3., 5.
☑ A6231 Petition for Conservatorship of Person only	1., 3., 5.
☐ A6232 Petition for Conservatorship of Estate only	1., 3., 5.
☐ A6243 Petition for Conservatorship of Spouse who Lacks Capacity	1., 3., 5.
☐ A6233 Petition for Approval of Medical Treatment without Consent	1., 3., 5.
☐ A6240 Petition for Guardianship of Person and Estate	1., 3., 5.
☐ A6241 Petition for Guardianship of Person only	1., 3., 5.
☐ A6242 Petition for Guardianship of Estate only	1., 3., 5.
☐ A6254 Trust Proceedings Petition	1., 5.
Other Probate Court Matters	
☐ A6260 Petition for Compromise of Minor's Claim - no civil case filed (3500 Prob. Code)	1., 5.
☐ A6180 Petition to Establish Fact of Birth, Death or Marriage	1., 5.
☐ A6200 Other Probate Matter (Specify):_____	1., 2.

-3-

III. Choose the district: Enter the address of the party or decedent residence, property, or other circumstance you have circled in Column 2 as the proper reason for filing in the district you selected.

REASON: CHECK THE NUMBER YOU CIRCLED IN -2- WHICH APPLIES IN THIS CASE			ADDRESS:
☐1. ☒2. ☐3. ☐4. ☐5. ☐6. ☐7. ☐8.			6214 Watertree Ct. Agoura, Cal. 91301
CITY: Agoura	STATE: Cal.	ZIP CODE: 91301	

IV. Certificate/Declaration of Assignment: The undersigned hereby certifies and declares that the above entitled matter is properly filed for assignment to the Central District of the Los Angeles Superior Court under § 392 et seq., Code of Civil Procedure, 2300 et seq. of the Family Code, 2200 and 7000 et seq. of the Probate Code, and Rule 2(b), (c) and (d) of this court for the reason checked above. I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and this declaration was executed on 10-17-00 (date).

Karen L. Shenk
(SIGNATURE OF ATTORNEY/FILING PARTY)

348

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name and mailing Address):	TELEPHONE NO.:	FOR COURT USE ONLY
MARIAN L. STANTON STANTON LAW CORPORATION 16530 Ventura Blvd. Suite 205 [redacted]no, California 91436-4589 ATTORNEY FOR (Name): Gayle Ann Shank	818-906-2877	**FILED** LOS ANGELES SUPERIOR COURT OCT 18 2000 JOHN A. CLARKE, CLERK K. Smith BY K. SMITH, DEPUTY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES STREET ADDRESS: 111 North Hill Street MAILING ADDRESS: 111 North Hill Street CITY AND ZIP CODE: Los Angeles, California 90012 BRANCH NAME: CENTRAL DISTRICT CASE NAME: MARRIAGE OF SHANK		
DECLARATION UNDER UNIFORM CHILD CUSTODY JURISDICTION ACT (UCCJA)		CASE NUMBER: BD332896

1. **I am a party** to this proceeding to determine custody of a child.
2. ☐ Declarant's present address is not disclosed. It is confidential under Family Code section 3409. The address of children presently residing with declarant is identified on this declaration as confidential.
3. *(Number)*: One minor children are subject to this proceeding as follows:

(Insert the information requested below. The residence information must be given for the last FIVE years.)

a. Child's name	Place of birth	Date of birth	Sex
KRYSTIN JEAN SHANK	Tarzana, Cal.	7-4-87	FEMAL

Period of residence	Address	Person child lived with *(name and present address)*	Relationship
6-01-99 to present	6214 Watertree Ct. Agoura, Cal. 91301 ☐ Confidential	Gayle Ann Shank, Petitioner	Mother
8[redacted]96 to 6-01-99	13 Willow Place Durango, Colorado 81301	Gayle Ann Shank and Donald Herbert Shank	Mother/ Father
6-4-87 to 8-1996	6214 Watertree Ct. Agoura, Cal. 91301	Gayle Ann Shank and Donald Herbert Shank	Mother/ Father
to			
to			

b. Child's name	Place of birth	Date of birth	Sex
☐ Residence information is the same as given above for child a. *(If NOT the same, provide the information below.)*			

Period of residence	Address	Person child lived with *(name and present address)*	Relationship
to present	☐ Confidential		
to			
to			349
to			

c. ☐ Additional children are listed on Attachment 3c. *(Provide requested information for additional children on an attachment.)*

(Continued on reverse)

SHORT TITLE: MARRIAGE OF SHANK	CASE NUMBER:

4. Have you participated as a party or a witness or in some other capacity in another litigation or custody proceeding, in California or elsewhere, concerning custody of a child subject to this proceeding?
[X] No [ ] Yes *(If yes, provide the following information)*:

a. Name of each child: KRYSTIN JEAN SHANK

b. Capacity of declarant: [ ] party [ ] witness [ ] other *(specify)*:

c. Court *(specify name, state, location)*:

d. Court order or judgment *(date)*:

5. Do you have information about a custody proceeding pending in a California court or any other court concerning a child subject to this proceeding, other than that stated in item 4?
[X] No [ ] Yes *(If yes, provide the following information)*:

a. Name of each child: KRYSTIN JEAN SHANK

b. Nature of proceeding: [ ] dissolution or divorce [ ] guardianship [ ] adoption [ ] other *(specify)*:

c. Court *(specify name, state, location)*:

d. Status of proceeding:

6. Do you know of any person who is not a party to this proceeding who has physical custody or claims to have custody of or visitation rights with any child subject to this proceeding?
[X] No [ ] Yes *(If yes, provide the following information)*:

a. Name and address of person	b. Name and address of person	c. Name and address of person
[ ] Has physical custody [ ] Claims custody rights [ ] Claims visitation rights	[ ] Has physical custody [ ] Claims custody rights [ ] Claims visitation rights	[ ] Has physical custody [ ] Claims custody rights [ ] Claims visitation rights
Name of each child	Name of each child	Name of each child

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: October 12, 2000

Gayle Ann Shank
(TYPE OR PRINT NAME)

Gayle Ann Shank
(SIGNATURE OF DECLARANT)

7. [X] Number of pages attached after this page: zero

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NOTICE TO DECLARANT: You have a continuing duty to inform this court if you obtain any information about a custody proceeding in a California court or any other court concerning a child subject to this proceeding.

1287

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address):	FOR COURT USE ONLY
MARIAN L. STANTON St. Bar #98007 STANTON LAW CORPORATION 16530 Ventura Blvd. Suite 205 Encino, California 91436-4589 TELEPHONE NO.: (818)906-2877 FAX NO.: ATTORNEY FOR (Name): Petitioner: Gayle Ann Shank	FILED LOS ANGELES SUPERIOR COURT MAY 10 2001 JOHN A. CLARKE, CLERK BY CARMEN MEHAFFIE, DEPUTY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES STREET ADDRESS: 111 NORTH HILL STREET MAILING ADDRESS: 111 NORTH HILL STREET CITY AND ZIP CODE: LOS ANGELES, CALIFORNIA 90012 BRANCH NAME: CENTRAL DISTRICT	
MARRIAGE OF PETITIONER: GAYLE ANN SHANK RESPONDENT: DONALD HERBERT SHANK	
JUDGMENT [X] Dissolution [ ] Legal separation [ ] Nullity [ ] Status only [ ] Reserving jurisdiction over termination of marital status [ ] Judgment on reserved issues Date marital status ends: ~~[illegible]~~ 5/10/01	CASE NUMBER: BD 332896

1. [ ] This judgment [ ] contains personal conduct restraining orders [ ] modifies existing restraining orders. The restraining orders are contained on page(s) of attachment. They expire on *(date)*:

2. This proceeding was heard as follows: [x] default or uncontested [x] by declaration under Fam. Code, § 2336
   [ ] contested
   a. Date: 5/10/01 Dept.: 28 Rm.: 233
   b. Judicial officer *(name)*: [X] Temporary judge [illegible]
   c. [ ] Petitioner present in court [ ] Attorney present in court *(name)*:
   d. [ ] Respondent present in court [ ] Attorney present in court *(name)*:
   e. [ ] Claimant present in court *(name)*: [ ] Attorney present in court *(name)*:
   f. [ ] Other *(specify name)*:

3. The court acquired jurisdiction of the respondent on *(date)*: October 26, 2000
   [x] Respondent was served with process [ ] Respondent appeared

4. THE COURT ORDERS, GOOD CAUSE APPEARING:
   a. [x] Judgment of dissolution be entered. Marital status is terminated and the parties are restored to the status of unmarried persons
      (1) [x] on the following date *(specify)*: ~~April 30, 2001~~ 5/10/01
      (2) [ ] on a date to be determined on noticed motion of either party or on stipulation.
   b. [ ] Judgment of legal separation be entered.
   c. [ ] Judgment of nullity be entered. The parties are declared to be unmarried persons on the ground of *(specify)*:
   d. [ ] This judgment shall be entered nunc pro tunc as of *(date)*:
   e. [ ] Judgment on reserved issues.
   f. [ ] Wife's [ ] Husband's former name be restored *(specify)*: 351
   g. [ ] Jurisdiction is reserved over all other issues and all present orders remain in effect except as provided below.
   h. [x] This judgment contains provisions for child support or family support. Both parties shall complete and file with the court a *Child Support Case Registry Form* (form 1285.92) within 10 days of the date of this judgment. The parents shall notify the court of any change in the information submitted within 10 days of the change by filing an updated form. The forms *Notice of Rights and Responsibilities* (form 1285.78) and *Information Sheet on Changing a Child Support Order* (form 1285.79) are attached.

(Continued on reverse)

STIPULATED JUDGMENT OF DISSOLUTION

The Court Orders as follows:

SECTION 1: GENERAL INFORMATION

1.1 Factual Information. The Court finds that the following information has been set forth by the Parties:

The full legal name of Respondent is **DONALD HERBERT SHANK**. His mailing address is 204 St. Andrews Circle, Durango, Colorado 81301. He is a citizen of the United States and a resident, for tax purposes, of Colorado.

The full legal name of Petitioner is **GAYLE ANN SHANK**. Her mailing address is 6214 Watertree Court, Agoura, California 91301. She is a citizen of the United States and a resident, for tax purposes, of California.

The Parties were married on October 26, 1985. The date of the Parties' separation was **June 1, 1999 ("Separation Date").**

The Parties have one minor child, **KRYSTIN JEAN SHANK (F)**, whose date of birth is July 4, 1987. (ad)

1.2 Agreement to Separate. The Court finds that the Parties have agreed to separate and live permanently apart. The purpose of this Stipulated Judgment is to make a final and complete settlement of rights and obligations arising out of the Parties' marriage, including their respective property rights and support rights. As part of their agreement to separate, the parties acknowledge and represent that they entered into a Marital Separation Agreement on June 1, 1999 and that the

within Stipulated Judgment of Dissolution is based upon that Agreement. At time of entry of Judgment the parties agree to submit that Separation Agreement to the Court as an Exhibit to the within Stipulated Judgment; however, the failure of the Court to accept such attachment, shall in no way alter, modify or nullify any portion of the within Stipulated Judgment of Dissolution.

1.3 Proceedings. This proceeding for dissolution of marriage between the Parties was filed in the Superior Court of the State of California, County of Los Angeles, Case Number BD 332896. The Petition was filed by Petitioner on October 18, 2000. The Court acquired jurisdiction over Respondent on October 26, 2000.

SECTION 2: PROPERTY SETTLEMENT AND CONFIRMATION OF SEPARATE PROPERTY

2.1 A. Division of Community/Quasi and Community and Mixed Property

2.1.1 Property Specified. The community/quasi community and mixed property of the Parties is Ordered to be divided as follows:

PROPERTY OF RESPONDENT FROM COMMUNITY OR MIXED PROPERTY. Respondent is awarded as his sole and separate property all of the following items:

1. All furniture, furnishings and appliances in Respondent's possession as of June 1, 1999;

2. Any interest that the community may have acquired in certain Colorado properties known generally Highway 160 (raw/undeveloped land) and Airpark Village in Durango, Colorado;

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3. Any interest and obligation that the community may have acquired in a Ford Explorer automobile leased by Respondent and returned at the end of the lease to G.E. Capital Lease.

PROPERTY OF PETITIONER FROM COMMUNITY OR MIXED PROPERTY.

Petitioner is awarded as her sole and separate property all of the following items:

1. Any interest that the community may have acquired in the separate property residence owned by the Petitioner prior to marriage and known generally as 6214 Watertree Court, Agoura, California 91301;

2. The proceeds from sale of a 1992 Ford Aerostar automobile traded in on a 2000 Ford Mustang;

3. All furniture, furnishings, appliances and artwork currently in Petitioner's possession as of June 1, 1999.

2.1.2 **Settlement.** The Court finds that the division of property set forth in Section 2.1.1 above represents an agreement of the Parties as to a division of the community property and a settlement of all claims involving commingled or contested separate property or for reimbursement by either Party. The Court finds that the community debts of the Parties were taken into consideration in effecting this division of the community property shall be without regard to value.

2.1 B: Confirmation of Separate Property:

2.1.B.1: **Separate Property Confirmed to Respondent:**

The following property is confirmed to Respondent as his sole and separate property:

SIOS 354

1) All right, title and interest in any business entity(is) to which Respondent claims or has claimed an interest including all debts, liabilities, liens, claims, whether choate or inchoate, causes of action or promissory obligations pertaining to the interest in said entity(is), including, but not limited to all of the following entities:

a. Denver & Rio Grande Railway (a Colorado corporation);

b. Rio Grande Southern Railroad Company LLC;

c. Donald Shank Enterprises;

d. Animas Airpark Development Associates LLC;

e. Partnership interest in Ludington Partners One;

2) All right, title and interest in that real property known generally as Highway 160 (titled in Ludington Partners One) and Airpark Village (titled in Animas Airpark Development Associates LLC) in Durango, Colorado, including all debt, liability, claims, whether choate or inchoate, causes of action or promissory obligations pertaining to his interest in said entity(is);

3) All property, of whatever nature or kind, whether real or personal, acquired by Respondent subsequent to June 1, 1999 including all debt, liability, claims, whether choate or inchoate, causes of action or promissory obligations pertaining to his interest in said entity(is);

4) All right, title and interest in a Ford Explorer leased and turned in to G.E. Capital Leasing by the Respondent including, all debt, liability, claims, whether choate or inchoate, causes of action or promissory obligations pertaining to his interest in said vehicle.

5) $6500.00 in ancient coins.

6) A 1996 F-250 Ford truck and outstanding loan balance with Ford Motor Credit in

the approximate amount of $9,400.00.

2.1.B.1: **Separate Property Confirmed to Petitioner:**

The following property is confirmed to Petitioner as her sole and separate property:

1) All right title and interest in the real property known generally as 6214 Watertree Court, Agoura, California 91301 and all acknowledged debts/liabilities/mortgages and liens relating thereto.

2) A life insurance policy insuring Petitioner's life (Farmers New World Life, policy number 006025663Y)

2.2 Allocation of Debts

2.2.1 **Basic Allocation**. Unless specifically provided otherwise in this Judgment, each Party is Ordered to be responsible for paying any and all obligations (whether known or unknown to either Party) secured by property received by that Party under the terms of this Judgment. Scheduled debts, liabilities, and obligations of the Parties are Ordered to be paid as follows:

Debts allocated to Respondent:

Respondent is assigned the obligation to pay, appear and hold Petitioner harmless from all debts awarded to him hereunder (including both community and separate debt).

1. All credit card debts on any and all credit cards in the name of Respondent, whether or not the charges were incurred prior to separation or subsequent to separation.

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2. The debt on a Bank of America Visa Account No.4024004697129639 which has an approximate current outstanding balance of $8,300.00. Respondent shall pay the outstanding balance owed on this account as soon as possible, but in no event later than (five) 5 days from the date that he receives proceeds from sale of any of his real property.

3. All debts incurred by Respondent and in his name or his name and any third party or entity at any time during marriage and at any time after separation.

4. **SEPARATE PROPERTY DEBT:** Respondent acknowledges and is assigned as his sole and separate responsibility and shall appear and hold Petitioner harmless from the following separate property debt pertaining to his separate property assets and/or post-separation debts, including but not limited to the following debt:

a. A Conoco Gas Credit Card Debt (Account #26 408 9889) which has a current outstanding balance of $536.22;

b. First U.S.A. MasterCard (Account # 5546 0830 1094 5406) which has a current outstanding balance of $9,851.69;

c. First U.S.A. Visa (Account #4417 1223 7651 1391) which has a current outstanding balance of $6,520.27;

d. Capital One Visa (Account #4388 6413 1877 3335) which has an outstanding balance of $5,984.67;

e. William Lauer (Promissory Note) in principal amount of $20,000.00 (plus interest);

f. Robert McAtee, et al (Promissory Note) in principal amount of $10,000.00 (plus interest);

g. Dorothy J. Shank (Promissory Note) in principal amount of $5,000.00 (plus interest);

h. Duane D. Danielson (Promissory Note) in the principal amount $18,897.00 (plus interest);

i. Pete Amass (unsecured debt) in the principal amount of $35,000.00 (plus interest);

j. 1st. National Bank of Durango (Note and Deed of Trust) in the principal amount of $240,000.00 (Respondent' liability on this debt is 16.67%);

k. William Lauer (Note and Deed of Trust) in the principal amount of $157,134.00 (Respondent's liability on this debt is 16.67%);

l. Robert McAtee (Note and Deed of Trust) in the principal amount of $31,428.00; (Respondent's liability on this debt is 16.67%);

m. Rodney Ludington (Respondent's liability on this debt is 16.67%).

n. Rocky Mountain Escrow (Note and Deed of Trust) in principal amount of $112,000.00. (Respondent's liability on this debt is 50%).

o. Dugan and Rasure (Legal services) in the principal amount of $113.94 (plus interest) (Respondent's share);

p. R.M. Bell & Associates (architecture) in the principal amount of $930.00 (plus interest) (Respondent's share);

q. All debt owed to the "Narrow Gauge Trust" in the

principal amount of $150,000.00 plus interest of 8%.

Debts allocated to Petitioner:

1. Community Debts:

Petitioner is assigned to obligation to pay, appear and hold Respondent harmless from the following community debt:

a. The monthly interest only payment on the Bank of America Visa account for which Respondent has been assigned the principal balance as his obligation.

Separate Property Debt: Petitioner acknowledges and is assigned the obligation to pay, appear and hold Respondent harmless from the following separate debt

a. All currently acknowledged debts and liabilities relating to her ownership of the property located at 6214 Watertree Court, Agoura, California, which the parties represent to each other as being;

b. Ford Motor Credit Union loan # NF A 308 F71W in the principal amount of $19,000.00 (plus interest);

c. Union Bank Account No. 3944327850 in the principal amount of $6,300.00 (plus interest);

d. Best Buy, Account No. 700106021059681 05 in the principal amount of $1100.00 (plus interest);

e. Macys Department Store Account No. 44 511 155 174 0 in the principal amount of $489.00;

f. American General Finance Account No. 5889 4390 0401 7864 in the principal amount of $169.00;

g. Healthcare Financial Management Services Account No. 53677 in the principal amount of $2,400.00.

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Those debts, obligations, and liabilities known to both Parties and incurred prior to the Separation Date (and not otherwise specifically assigned to a Party under this Judgment), shall be paid by the Party or Parties responsible for incurring the debt. Except as otherwise provided in this Judgment, any debt or claim against the Parties, unknown to one or both Parties and incurred prior to the Separation Date, shall be the responsibility of the Party or Parties incurring the debt. Unless specifically provided otherwise in this Judgment, debts, known or unknown, incurred after the Separation Date are Ordered to be paid by the Party incurring the debt.

2.2.2 **Credit Card Accounts.** All existing charge and credit accounts in the name of Respondent and Petitioner, or in the name of either Party, under which the other can make purchases or secure credit, other than the above referenced Bank of America Visa and Mobil credit cards shall immediately be closed or changed to the name of the Party retaining that account without recourse against the other Party. Any outstanding indebtedness on these accounts, not otherwise specifically scheduled to be paid by one Party, is Ordered to be paid by the Party incurring the debt, notwithstanding the general allocation of debts provided above.

2.2.3 **Claims by Third Parties**. Except as set forth in this Judgment, the Court finds that each Party warrants that he or she has not incurred, and each is Ordered not to incur, any liability or obligation on which the other may be liable. The Court Orders that if any claim, action, or proceeding shall be brought seeking to hold the other liable on account of any such liability, obligation, act, or omission (other than those incurred for the support and maintenance of a Party or a minor child for which a Party may become liable under this Judgment or under any order of a court

of competent jurisdiction), the obligated Party shall, at his or her sole expense, defend the other Party against any such claim, liability, or obligation (whether or not well founded) and shall hold the other Party free and harmless from it. This indemnification shall include any costs, including attorney's fees, reasonably incurred by the other Party in defending any claim made against him or her. The Court finds that the Parties understand that any orders contained in this Judgment for one Party to assume the obligation of the community or post-separation debts of the other Party may not be binding on creditors and that a creditor may have rights to seek payment against either Party. The Court further finds that the Parties understand that their obligations to each other, and to third-party creditors, are subject to possible discharge in bankruptcy.

SECTION 3: FAMILY RESIDENCE. The Parties have used as their family home the residence at 6214 Watertree Court, Agoura, California 91301 (the "Residence"). The Residence includes all improvements, appurtenant structures, grounds, and easements. The Court finds that the Residence is the separate property of Petitioner, purchased by Petitioner in her own name prior to marriage. The parties' acknowledge and warrant that at no time was title ever transferred to the parties jointly or as community property. The parties acknowledge that in connection with Petitioner's earlier refinancing of said residence, Respondent executed a Quit Claim Deed in favor of Petitioner and that said Quit Claim remains in full force and effect. If necessary or required and at Petitioner's request, Respondent is Ordered to execute and deliver to Petitioner a quitclaim deed in a form suitable for recordation confirming that Respondent has no interest in the Residence.

SECTION 4: SPOUSAL SUPPORT. The Court finds that Respondent and Petitioner have waived any right to current spousal support. No court shall have jurisdiction to order spousal support for either Party at any time. Notwithstanding any other Sections in this Judgment, no court shall have the ability to extend its jurisdiction over support beyond the time set for jurisdiction to end, as provided above, regardless of when a Party may bring a motion to do so and irrespective of any change in economic or other circumstances of the Parties. The Court finds that the Parties understand that when a court has no jurisdiction over support, no support can be ordered regardless of the hardship that this might cause. The Court finds that the Parties have carefully bargained for the absence of support as provided in this Judgment, and the provisions of this Section are intended to comply with the requirements of In re Marriage of Vomacka (1984) 36 Cal.3d 459, and In re Marriage of Brown (1995) 35 Cal.App.4th 785, to make clear that no court shall have authority to provide for support of any amount at any time.

SECTION 5: CHILD SUPPORT.

1) **Direct Support**: Based on the following financial factors, Respondent shall pay to the Petitioner as and for child support the sum of $66.00 per month payable one half on the first and one-half on the fifteenth day of each month commencing November 1, 2000 and continuing until the minor child reaches the age of majority, dies, marries, becomes emancipated or reaches the age of 19 years and is still enrolled full-time in high school or further order of court whichever first occurs.

Petitioner's Gross Monthly Income: $7,000.00

Respondent's Gross Monthly Income: 1,000.00

Petitioner's Custodial Time:	80%
Respondent's Custodial Time:	20%
Petitioner's Medical Ins. Costs for Child	$300.00
Petitioner's Tax Filing: Head of Household:	2
Respondent's Tax Filing: Single:	1

The Court finds that the Parties acknowledge, pursuant to Family Code section 4065, that: (i) they are fully informed of their rights concerning child support; (ii) they have agreed to the child support provisions of this Judgment without coercion or duress; (iii) this Judgment is in the best interests of the child involved; (iv) the needs of the child will be adequately met by this agreed-upon arrangement; and (v) they have not assigned the right to support to the county and no public assistance application is pending.

2) **Medical/Health Expenses**: Petitioner shall maintain her current health/medical policy of insurance for the minor child (or a comparable one at a reasonable price). Each party shall pay one half of the uncovered/uninsured medical, dental, psychological, optical, orthodontia and health related expenses of the minor child.

SECTION 6: CHILD CUSTODY

6.1 Custody. The Parties have one minor child, **KRYSTIN JEAN SHANK** (born June 4, 1987). Legal custody of the minor child is Ordered to be with Petitioner under Family Code section 3006. "Sole Legal Custody" under Section 3006 "means that one parent shall have the right and the responsibility to make the decisions

relating to the health, education, and welfare of a child." Physical custody of the minor child of the Parties is Ordered to be with Petitioner under Family Code section 3007. "Sole Physical Custody" under Section 3007 "means that a child shall reside with and be under the supervision of one parent, subject to the power of the court to order visitation."

SECTION 7: RELEASES, WARRANTIES, WAIVERS

7.1 Warranty re Undisclosed Gifts. The Court finds that each Party warrants that he or she has not made, without the consent of the other, any gift or transfer of the Parties' community or quasi-community property to any single person or entity exceeding a cumulative total of Five Hundred Dollars ($500) (other than a transfer in exchange for fair and reasonable consideration to the community or a family gift known to the other Party).

7.2 Division of Undisclosed Property. If a court of competent jurisdiction shall later determine that either Party is now possessed of any community or quasi-community property not set forth in this Judgment, or that one Party has made, without the consent of the other, any gift or transfer of the Parties' community or quasi-community property to any single person or entity exceeding a cumulative total of Five Hundred Dollars ($500) (other than a transfer in exchange for fair and reasonable consideration to the community or a family gift known to the other Party), then the Party at fault is Ordered to transfer or pay to the other, at the other's election, (i) the other's share of the property, if it is reasonably susceptible of division, (ii) the full market value of the other's interest on the Effective Date of

this Judgment, or (iii) the full market value of the other's interest at the time the other Party discovers the gift or the ownership of the property. Nothing contained in this subsection shall limit any other remedies available at law for undisclosed property, including the Court's discretion to make an unequal division of any intentionally or negligently omitted assets pursuant to Family Code section 2556.

7.3 Warranty of Full Disclosure. The Court finds that each Party warrants that he or she has made a full and accurate disclosure to the other pursuant to Family Code section 2100 of all assets, liabilities, and encumbrances, and their values, in which one or both Parties have or may have an interest, and each has made a full and accurate disclosure of his or her income. The Court finds that the Parties warrant that they have met their duty pursuant to Family Code section 2100 to update and augment that information including advising the other of any material facts that could substantially affect the value of any asset up until the time of this Judgment.

7.4 Property Acquired After Separation. Any property acquired by either Party after the Separation Date shall be the sole and separate property of the Party acquiring it. The Court finds that each Party waives any property rights in or to any future acquisitions of property by the other.

7.5 Review of Insurance Policies and Retirement Plans. The Court finds that the Parties are aware of Family Code section 2024 advising parties to a dissolution of marriage to review their wills, insurance policies, retirement benefit plans, credit cards, credit accounts, credit reports, and other matters that they may wish to change. The Parties are advised to review all property rights and employment

benefits that have survivorship or inheritance factors (including, without limitation, life insurance, pensions, trusts, jointly held real and personal property, and bank accounts) to insure that each expresses the present intent of the Parties, particularly with respect to title and beneficiary designation.

7.6 Waiver of Inheritance Rights. The Court finds that each Party waives any and all right to inherit the estate of the other at his or her death; or to take property from the other by devise or bequest (unless under a will executed subsequent to the Effective Date of this Judgment); or to claim any family allowance or probate homestead; or to act as the personal representative upon intestacy of the other's estate (except as the nominee of another person legally entitled to the right); or to act as the personal representative under the will of the other (unless under a will executed subsequent to the Effective Date of this Judgment).

7.7 Reimbursement Waivers. Except as otherwise provided in this Judgment, the Court finds that each Party waives each of the following:

Epstein credits (In re Marriage of Epstein (1979) 24 Cal.3d 76) and all rights to reimbursement to which a Party may be entitled to as a result of the payment of community obligations since the Separation Date.Watts credits (In re Marriage of Watts (1985) 171 Cal. App.3d 366) and all rights to reimbursement to which a Party may be entitled to as a result of one Party's use of community assets since the Separation Date. All rights to reimbursement under Family Code section 2640, or otherwise, for separate property contributed to the acquisition or maintenance of community property.

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7.8 Waiver of Discovery Rights. The Court finds that the Parties understand that they have a right to discovery, which includes taking depositions, submitting interrogatories, obtaining documents, requesting admissions, using subpoenas, and obtaining appraisals. The Court finds that they have chosen not to exercise any further right to discovery or conduct any investigation beyond that already performed. The Court finds that the Parties each understand that by failure to engage in discovery either one may not fully appreciate the full extent of the assets and debts of the Parties subject to the Court's jurisdiction or the character and value of each asset and debt. The Court finds that each Party understands that this lack of knowledge may mean that the division of community property is not equal, that the level of support provided may be less than fully available under law, or that either one may not have received the optimum settlement to which he or she is entitled under California law.

7.9 Trial and Judgment Relief Waivers. With regard to this Judgment, the Court finds that the Parties waive a statement of decision, the right to a new trial, the right to petition for a rehearing, the right to appeal, and any rights under the Soldiers' and Sailors' Civil Relief Act of 1940, as amended.

SECTION 8: ATTORNEY REPRESENTATION AND FEES

8.1 Attorney Representation. This Judgment has been negotiated and prepared by Marian L. Stanton with Stanton Law Corporation, an attorney at law duly licensed to practice in the State of California, who is representing Petitioner in connection with this Judgment and proceeding for dissolution of marriage.

Respondent has been informed that Marian L. Stanton has acted solely as counsel for Petitioner, did not advise or represent Respondent in this settlement, and owes no legal duty to Respondent. Respondent has been strongly advised to seek the advice of independent counsel in this matter. Nevertheless, he has chosen to waive the right to independent counsel and to represent himself. He enters into this waiver knowingly, intelligently, and voluntarily, and expressly acknowledges that this waiver may affect any ability to set aside the Judgment.

8.2 Attorney's Fees. Each Party is Ordered to pay his or her own attorney's fees and costs incurred in the negotiation and preparation of this Judgment. The Court finds that each Party has expressly waived any right to ask the Court for an award of attorney's fees or costs through the entry of this Judgment.

SECTION 9: TAX MATTERS

9.1 Parties' Understanding of Joint and Several Liability. The Court finds that the Parties recognize that the allocation between them of the responsibility for the payment of taxes on joint income tax returns (as set forth in this Judgment) is not binding on the Internal Revenue Service, the Franchise Tax Board (unless a tax clearance certificate under Revenue and Taxation Code section 19006 has previously been issued), or any other taxing authority. The Parties are aware that if either Party fails to pay the taxes for which he or she is responsible, the law may give the taxing authority power to collect these taxes from the other Party.

9.2 Indemnification and Enforcement. If the anticipated deductibility, taxability, or tax allocation of any item in this Judgment is not accepted by a taxing

authority, the Party benefitting from that determination, to the extent of any benefit, shall indemnify and hold harmless the other Party from all expenses and liabilities, including deficiencies, interest, penalties, and professional fees. If, however, the action by the taxing authority results from the indemnifying Party's taking a position inconsistent with this Judgment, the indemnification in the preceding sentence shall not be limited to the benefit enjoyed. The Parties are Ordered to report all income, losses, and deductions (or other taxable consequence) to the appropriate taxing authorities in a manner consistent with this Judgment. A Party responsible for payment of taxes or filing a return who fails to perform those responsibilities or comply with the tax provisions of this Judgment is Ordered to indemnify and hold harmless the other Party from all liabilities and expenses so incurred, including, without limitation, all deficiencies, interest, penalties, and professional fees. Each Party also is Ordered to be solely responsible for, and shall indemnify and hold harmless the other Party from, all such liabilities and expenses associated with his or her failure to report any separate property income or improper deductions claimed with respect to periods after the Separation Date. The Court finds that the Parties agree that any indemnification payment from one Party to the other, with respect to taxes, shall be deemed a tax-free interspousal transfer related to the cessation of marriage to effect a division of marital property under Internal Revenue Code section 1041 and comparable provisions of state law, regardless of the date on which the payment is made. The Court reserves jurisdiction to enforce the allocations set forth in this Judgment, including, without limitation, granting to either Party a security interest in the property of the Party who is responsible for the unpaid taxes.

9.3 Dependent Tax Exemption. Petitioner shall be entitled to claim the minor child of the Parties as a dependent on federal and state income tax returns filed hereafter. A Party releasing an exemption to the other is Ordered to promptly execute, upon the other Party's request, any documents necessary to confirm the allocation of the dependent's exemption according to this provision, including, without limitation, Internal Revenue Service Form 8332. The Court retains jurisdiction to modify this provision.

9.4 Tax Basis. The Court finds that the Parties agree that under Internal Revenue Code section 1041, or the tax principles regarding interspousal division of community property, the allocation of property between the Parties under this Judgment is not taxable, and the tax basis of each asset allocated under these provisions has not changed, and will not change, by reason of this division. Each Party is Ordered not to seek a new tax basis for any asset grounded on any such change even though the transaction may otherwise appear to be a bona fide sale.

9.5 Separate Tax Returns. The Court finds that the Parties acknowledge that a joint tax return of the Parties may not be filed for the year in which the judgment of dissolution of marriage terminating marital status is obtained. Each Party is Ordered to report on his or her own return one-half of any community property income (including earnings from personal services rendered prior to the Separation Date) and income or gain from separate property. Each Party will be entitled to credits for one-half of any tax withholdings from the community income and for one-half of any estimated taxes paid from his or her respective community property (including overpayments from the prior year credited to taxes for such year), plus all estimated taxes paid from separate property, plus all estimated and withheld

taxes from his or her separate property and separate income. Each Party shall include all income from his or her separate property and all income from his or her earnings from personal services earned after the Separation Date. Each Party shall take the deductions to which he or she is entitled; any deductions attributable to community investments or payments from community funds shall be divided equally. The Parties are Ordered to exchange information with each other that is necessary or helpful to the other in preparing the separate returns on a prompt basis, but by no later than March 15th of the year following the tax year for which returns will be filed. Each Party shall be solely liable for the taxes due on his or her respective returns, and each shall be solely entitled to any refunds paid.

9.6 Audit of Joint Tax Returns. With respect to periods during the marriage, the Parties have filed (or will file) joint federal and state income tax returns. If any of those returns is audited, or if deficiencies or refunds arise for any other reason, the audit and allocation of deficiencies or refunds shall be governed by this Section 9.6. Each Party is Ordered to immediately provide written notice, and shall forward a copy, to the other Party of any statutory notice of deficiency (90-day letter), or any other communication from any taxing authority regarding tax liabilities of either Party attributable to joint returns for periods during the marriage. The Parties are Ordered to cooperate fully with each other, are Ordered to execute all documents reasonably requested by the other, and are Ordered to furnish information and testimony necessary to respond to the action asserted by the taxing authority. If a deficiency is to be paid, or a refund to be received, the tax liability of both Parties shall be apportioned between the Parties in the same proportion that each Party's respective liability on a married-filing-separately basis bears to the total of both

Parties' liabilities on a married-filing-separately basis whether or not either Party decides to contest any assessment. The Parties shall likewise share on the same basis any refunds arising from joint federal or state tax returns, after paying any professional fees and costs incurred in obtaining the refund. Each Party shall pay, on a timely basis, any additional tax to the extent that his or her allocated share of the joint tax liability is greater than his or her share of taxes previously paid. Each Party shall share in any refund to the extent that his or her share of taxes previously paid exceeds his or her allocated share of the joint tax liability.

9.7 Married-Filing-Separately Basis. Any provision in this SECTION 9 adjusting tax liability on a "married-filing-separately" basis shall mean that each Party shall share in the obligation or claim based on the ratio that his or her separate tax liability bears to the total of both Parties' separate tax liabilities had the Parties filed separate tax returns for the calendar year(s) in question. In computing the Parties' separate taxes, each Party shall be credited with all deductions that flow from separate property income and assets, and deductions that are personal to that Party (including, without limitation, interest on home loans, taxes, contributions, and medical expenses). Tax deductible expenses and credits, including prior payments of tax, not clearly attributable to the separate property of either Party, shall be shared equally. Refunds attributable to loss carrybacks from periods after the Separation Date shall belong solely to the Party whose post-separation transactions generated the loss. Interest to be received and penalties and interest to be paid shall be allocated in proportion to the allocation of the refund or the deficiency. If the Parties are unable to agree on the allocation, the allocation shall be determined with finality by an attorney or accountant agreeable to the Parties,

or, if they cannot agree, by the Court, for which purpose the Court retains jurisdiction.

SECTION 10: RESERVATION OF JURISDICTION. The Court retains jurisdiction (except as otherwise provided in this Judgment) to make orders and determinations that are necessary and/or appropriate (i) to enforce any of the terms of this Judgment or otherwise effectuate the division of property as specified in the Judgment; (ii) to resolve any matter subject to the jurisdiction of the Court that has not otherwise been resolved by the terms of the Judgment, or to resolve any dispute that may arise concerning the terms of the Judgment; and (iii) to resolve claims regarding omitted or undisclosed property and obligations.

SECTION 11: RECONCILIATION. Any reconciliation between the Parties shall not cancel, terminate, modify, or waive any provisions of this Judgment, unless the Parties so agree in writing. However, nothing in this subsection shall be construed to waive either Party's rights in community property accrued after a reconciliation.

SECTION 12: QUASI-COMMUNITY PROPERTY. Whenever community property is referred to in this Judgment, it is understood that it includes quasi-community property to the extent that such property exists.

SECTION 13: NOTICES. Any notice under this Judgment must be in writing and shall be effective upon delivery by hand or three (3) business days after deposit in the United States mail, postage prepaid, certified or registered, and addressed to

Respondent or to Petitioner at the address appearing with his or her name at the top of this Judgment. Either Party shall be obligated to notify the other in writing of any change in his or her address. Notice of change of address shall be effective only when done in accordance with this Section.

SECTION 14: ENTIRE AGREEMENT. This Judgment is intended to be the final, complete, and exclusive agreement of the Parties on the matters it covers. It supersedes any previous or contemporaneous oral or written agreements between the Parties with respect to these matters. There are no representations, warranties, promises, or agreements with respect to these matters, except as set forth in this Judgment.

SECTION 15: SEVERABILITY. If a court holds any provision of this Judgment to be invalid, unenforceable, or void, the remainder of this Judgment shall remain in full force and effect.

SECTION 16: INTERPRETATION. This Judgment shall be construed as a whole, according to its fair meaning, and not in favor of or against any Party. For example, no provision shall be construed in favor of the Party receiving a benefit nor against the Party responsible for any particular language. Section headings are used for reference purposes only and should be ignored in the interpretation of the Judgment.

IT IS SO ORDERED.

Ann Dobbs

DATED: 5/9/01

~~JUDGE~~/JUDGE PRO TEMPORE ANN DOBBS

ANN DOBBS

STATE OF CALIFORNIA)

COUNTY OF Los Angeles)

On October 28 ,2002, before me, the undersigned, a notary public, personally appeared DONALD HERBERT SHANK, ~~personally known by me (~~or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

Parimal J. Christian
NOTARY PUBLIC

PARIMAL J. CHRISTIAN
Commission # 1164382
Notary Public - California
Los Angeles County
My Comm. Expires Jan 2, 2002

STATE OF CALIFORNIA)

COUNTY OF Los Angeles)

On October 28 ,2002, before me, the undersigned, a notary public, personally appeared GAYLE ANN SHANK, ~~personally known by me (~~or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same in her authorized capacity, and that by her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

Parimal J. Christian
NOTARY PUBLIC

PARIMAL J. CHRISTIAN
Commission # 1164382
Notary Public - California
Los Angeles County
My Comm. Expires Jan 2, 2002

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SECTION 17: EXECUTION OF DOCUMENTS. Each Party is Ordered, at the request of the other, to execute and deliver any instrument, furnish any information, and perform any other act reasonably necessary to carry out the provisions of this Judgment without undue delay or expense. Any Party who fails to comply with this Section is Ordered to reimburse the other Party for any reasonable expenses, including attorney's fees and court costs, that as a result of this failure become reasonably necessary to carry out the terms of this Judgment.

SECTION 18: ACKNOWLEDGMENTS. The Court finds that each Party acknowledges that he or she respectively (i) is fully informed as to the facts relating to the subject matter of this Judgment, and as to the rights and liabilities of both Parties; (ii) enters into this Judgment voluntarily, free from fraud, undue influence, coercion, or duress of any kind; and (iii) has read, considered, and understands each provision of this Judgment.

THE PARTIES APPROVE AS TO FORM AND CONTENT:

Donald Herbert Shank DATED: 10-25-00

DONALD HERBERT SHANK

Gayle Ann Shank DATED: 10-25-00

GAYLE ANN SHANK

Approved as to Form :

[signature] DATED: 4-27-01

Marian L. Stanton
Attorney for GAYLE ANN SHANK

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NAME AND ADDRESS OF SENDER:	TELEPHONE NO: 818-906-28?,	For Court Use Only:
MARIAN L. STANTON STANTON LAW CORPORATION 16530 Ventura Blvd. Suite 205 Encino, California 91436-4589	St.Bar #98007	**FILED** LOS ANGELES SUPERIOR COURT MAY 10 2001 JOHN A. CLARKE, CLERK BY CARMEN MEHAFFIE, DEPUTY
Insert name of court, judicial district of branch court, if any, and Post Office and Street Address LOS ANGELES SUPERIOR COURT 111 North Hill Street 111 North Hill Street Los Angeles, California 90012		
PLAINTIFF: GAYLE ANN SHANK		
DEFENDANT: DONALD HERBERT SHANK		
NOTICE AND ACKNOWLEDGMENT OF RECEIPT		Case Number: BD 332896

TO: DONALD HERBERT SHANK
(Insert name of individual being served)

This summons and other document(s) indicated below are being served pursuant to Section 415.30 of the California Code of Civil Procedure. Your failure to complete this form and return it to me within 20 days may subject you (or the party on whose behalf you are being served) to liability for the payment of any expenses incurred in serving a summons on you in any other manner permitted by law.

If you are being served on behalf of a corporation, unincorporated association (including a partnership), or other entity, this form must be signed by you in the name of such entity or by a person authorized to receive service of process on behalf of such entity. In all other cases, this form must be signed by you personally or by a person authorized by you to acknowledge receipt of summons. Section 415.30 provides that this summons and other document(s) are deemed served on the date you sign the Acknowledgment of Receipt below, if you return this form to me.

Dated: OCTOBER 26, 2000

Marian L. Stanton
by personal delivery
(Signature of sender)

ACKNOWLEDGMENT OF RECEIPT

This acknowledges receipt of: (To be completed by sender before mailing)

1. [ ] A copy of the summons and of the complaint.
2. [X] A copy of the summons and of the Petition (Marriage) and: FL Cover Sheet/Conf.Counseling
   - [X] Blank Confidential Counseling Statement (Marriage)
   - [ ] Order to Show Cause (Marriage)
   - [ ] Blank Responsive Declaration
   - [ ] Blank Financial Declaration
   - [X] Other: (Specify) Blank Response

(To be completed by recipient)

Date of receipt: October 26, 2000

Donald Herbert Shank
DONALD HERBERT SHANK
(Signature of person acknowledging receipt, with title if acknowledgment is made on behalf of another person)

Date this form is signed: October 26, 2000

(Type or print your name and name of entity, if any, on whose behalf this form is signed)

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1292.05

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, ...ate bar number, and address):	FOR COURT USE ONLY
MARIAN L. STANTON STANTON LAW CORPORATION 16530 Ventura Blvd. Suite 205 E...cino, California 91436-4589 TELEPHONE NO.: 818-906-2877 FAX NO.: 818-501-2021 ATTORNEY FOR (Name): Gayle Ann Shank	FILED LOS ANGELES SUPERIOR COURT MAY 10 2001 JOHN A. CLARKE, CLERK BY CARMEN MEHAFFIE, DEPUTY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES STREET ADDRESS: 111 North Hill Street MAILING ADDRESS: 111 North Hill Street CITY AND ZIP CODE: Los Angeles, California 90012 BRANCH NAME: CENTRAL DISTRICT	
PETITIONER: GAYLE ANN SHANK RESPONDENT: DONALD HERBERT SHANK	
DECLARATION REGARDING SERVICE OF DECLARATION OF DISCLOSURE AND INCOME AND EXPENSE DECLARATION [X] Petitioner's [X] Preliminary [ ] Respondent's [X] Final	CASE NUMBER: BD 332896

1. I am the [X] Petitioner [ ] Respondent in this matter.

2. [X] My *Preliminary Declaration of Disclosure* and *Income and Expense Declaration* was served on:
   [ ] Petitioner [X] Respondent by: [X] personal service [ ] mail [X] other *(specify)*:
   on *(date)*:

3. [X] My *Final Declaration of Disclosure* and *Income and Expense Declaration* was served on:
   [ ] Petitioner [X] Respondent by: [X] personal service [ ] mail [ ] other (specify):
   on *(date)*:

4. [ ] Service of the *Final Declaration of Disclosure* has been waived pursuant to Family Code section 2105, subdivision (c).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: 10/26/00

GAYLE ANN SHANK
(TYPE OR PRINT NAME)

Gayle Ann Shank
(SIGNATURE)

Note:
File this document with the court.
Do not file a copy of either the *Preliminary* or *Final Declaration of Disclosure* with this document.

Form Adopted by Rule 1292.05
Judicial Council of California
1292.05 (Rev. January 1, 1999)
Mandatory Form

DECLARATION REGARDING SERVICE OF DECLARATION OF DISCLOSURE
(Family Law)

Family Code, §§ 2106, 2112

1292.05

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address):	FOR COURT USE ONLY
TELEPHONE NO.: FAX NO.: ATTORNEY FOR (Name):	**FILED** LOS ANGELES SUPERIOR COURT MAY 10 2001 JOHN A. CLARKE, CLERK BY CARMEN MEHAFFIE, DEPUTY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES STREET ADDRESS: 111 North Hill Street MAILING ADDRESS: 111 North Hill Street CITY AND ZIP CODE: Los Angeles, California 90012 BRANCH NAME: CENTRAL DISTRICT	
PETITIONER: GAYLE ANN SHANK RESPONDENT: DONALD HERBERT SHANK	
DECLARATION REGARDING SERVICE OF DECLARATION OF DISCLOSURE AND INCOME AND EXPENSE DECLARATION [ ] Petitioner's [X] Preliminary [X] Respondent's [X] Final	CASE NUMBER: BD 332896

1. I am the [ ] Petitioner [X] Respondent in this matter.

2. [X] My *Preliminary Declaration of Disclosure* and *Income and Expense Declaration* was served on:
   [X] Petitioner [ ] Respondent by: [X] personal service [X] mail [ ] other *(specify)*:
   on *(date)*: 3-28-01

3. [X] My *Final Declaration of Disclosure* and *Income and Expense Declaration* was served on:
   [X] Petitioner [X] Respondent by: [X] personal service [X] mail [ ] other (specify):
   on *(date)*: 3-28-01

4. [ ] Service of the *Final Declaration of Disclosure* has been waived pursuant to Family Code section 2105, subdivision (c).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: 3/28/01

DONALD HERBERT SHANK
(TYPE OR PRINT NAME)

Donald Herbert Shank
(SIGNATURE)

Note:
File this document with the court.
Do not file a copy of either the *Preliminary* or *Final Declaration of Disclosure* with this document.

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1282.50

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address):	FOR COURT USE ONLY
MARIAN L. STANTON STANTON LAW CORPORATION [illegible]530 Ventura Blvd. [illegible]ite 205 Encino, California 91436-4589 TELEPHONE NO.: 818-906-2877 FAX NO.: 818-501-2021 ATTORNEY FOR (Name): Gayle Ann Shank	**FILED** LOS ANGELES SUPERIOR COURT MAY 10 2001 JOHN A. CLARKE, CLERK BY CARMEN MEHAFFIE, DEPUTY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES STREET ADDRESS: 111 North Hill Street MAILING ADDRESS: 111 North Hill Street CITY AND ZIP CODE: Los Angeles, California 90012 BRANCH NAME: CENTRAL DISTRICT	
PETITIONER: GAYLE ANN SHANK RESPONDENT: DONALD HERBERT SHANK	
APPEARANCE, STIPULATIONS, AND WAIVERS	CASE NUMBER: BD 332896

1. [X] Respondent makes a general appearance.
2. [ ] Respondent has previously made a general appearance.
3. [ ] Respondent is a member of the military services of the United States of America and waives all rights under the Soldiers and Sailors Civil Relief Act of 1940, as amended, and does not contest this proceeding.
4. [X] The parties stipulate that this cause may be tried as an uncontested matter.
5. [X] The parties waive their rights to notice of trial, findings of fact and conclusions of law, motion for new trial, and the right to appeal.
6. [X] This matter may be tried by a commissioner sitting as a temporary judge.
7. [ ] A written settlement agreement has been entered into between the parties.
8. [X] A stipulation for judgment will be submitted to the court at the uncontested proceeding.
9. [X] None of these stipulations or waivers shall apply unless the court approves the written settlement agreement or stipulation for judgment.
10. [ ] Both parties have executed an *Advisement and Waiver of Rights Re: Establishment of Parental Relationship* (form 1296.72).
11. [ ] Other *(specify)*:

12. Total number of boxes checked: _____

Date:

GAYLE ANN SHANK
(TYPE OR PRINT NAME)

Date: 3-28-01

DONALD HERBERT SHANK
(TYPE OR PRINT NAME)

Date: 3-28-01

Marian L. Stanton
(TYPE OR PRINT NAME)

Date: 3-28-01

(TYPE OR PRINT NAME)

▶ Gayle Ann Shank
(SIGNATURE OF PETITIONER)

▶ Donald Herbert Shank
(SIGNATURE OF RESPONDENT)

▶ Marian L. Stanton
(SIGNATURE OF ATTORNEY FOR PETITIONER)

▶ —
(SIGNATURE OF ATTORNEY FOR RESPONDENT)

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1286.50

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address):	FOR COURT USE ONLY
MARIAN L. STANTON STANTON LAW CORPORATION 16530 Ventura Blvd. [redacted]no, California 91436-4589 TELEPHONE NO.: 818-906-2877 FAX NO.: 818-501-2021 ATTORNEY FOR (Name): Gayle Ann Shank	**FILED** LOS ANGELES SUPERIOR COURT MAY 10 2001 JOHN A. CLARKE, CLERK Carmen Mehaffie BY CARMEN MEHAFFIE, DEPUTY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES STREET ADDRESS: 111 North Hill Street MAILING ADDRESS: 111 North Hill Street CITY AND ZIP CODE: Los Angeles, California 90012 BRANCH NAME: CENTRAL DISTRICT	
MARRIAGE OF PETITIONER: GAYLE ANN SHANK RESPONDENT: DONALD HERBERT SHANK	
DECLARATION FOR DEFAULT OR UNCONTESTED [X] DISSOLUTION or [ ] LEGAL SEPARATION	CASE NUMBER: BD 332896

(NOTE: Items 1 through 16 apply to both dissolution and legal separation proceedings.)

1. I declare that if I appeared in court and were sworn, I would testify to the truth of the facts in this declaration.
2. I agree that my case will be proven by this declaration and that I will not appear before the court unless I am ordered by the court to do so.
3. All the information in the [X] Petition [ ] Response is true and correct.
4. DEFAULT OR UNCONTESTED *(Check a or b)*
   a. [ ] The default of the respondent was entered or is being requested, and I am not seeking any relief not requested in the petition. **OR**
   b. [X] The parties have agreed that the matter may proceed as an uncontested matter without notice, and the agreement is attached or it is incorporated in the attached marital settlement agreement or stipulated judgment.
5. MARITAL SETTLEMENT AGREEMENT *(Check a or b)*
   a. [X] The parties have entered into an [ ] AGREEMENT or [X] STIPULATED JUDGMENT regarding their property and marital rights, including support, the original of which is or has been submitted to the court. I request the court to approve the agreement. **OR**
   b. [ ] There is NO AGREEMENT or STIPULATED JUDGMENT, and the following statements are true *(check at least one, including item (2) if a community estate exists)*:
      (1) [ ] There are no community or quasi-community assets or community debts to be disposed of by the court.
      (2) [ ] The community and quasi-community assets and debts are listed on the attached **completed** current *Property Declaration* (form 1285.55), which includes an estimate of the value of assets and debts that I propose to be distributed to each party. The division in the proposed *Judgment (Family Law)* is a fair and equal division of the property and debts, or if there is a negative estate, the debts are assigned fairly and equitably.
6. DECLARATION OF DISCLOSURE *(Check a, b, or c)*
   a. [X] Both the petitioner and respondent have filed, or are filing concurrently, a *Declaration Regarding Service of the Preliminary and Final Declaration of Disclosure* and *Income and Expense Declaration*.
   b. [ ] This matter is proceeding by default. I am the Petitioner in this action and have filed a proof of service of the *Preliminary Declaration of Disclosure* with the court. I hereby waive receipt of the *Final Declaration of Disclosure* from the respondent.
   c. [ ] This matter is proceeding as an uncontested action. Service of the *Final Declaration of Disclosure* is mutually waived by both parties. A waiver provision is contained in the marital settlement agreement or proposed judgment.
7. [ ] CHILD CUSTODY should be ordered as set forth in the proposed *Judgment (Family Law)*.
8. [ ] CHILD VISITATION should be ordered as set forth in the proposed *Judgment (Family Law)*.
9. SPOUSAL AND FAMILY SUPPORT *If a support order or attorney fees are requested, submit a completed* Income and Expense Declaration *(form 1285.50), unless a current form is on file. Include your best estimate of the other party's income.*
   (Check at least one of the following)
   a. [X] I knowingly give up forever any right to receive spousal support.
   b. [ ] I ask the court to reserve jurisdiction to award spousal support in the future to *(name)*:
   c. [ ] Spousal support should be ordered as set forth in the proposed *Judgment (Family Law)*.
   d. [ ] Family support should be ordered as set forth in the proposed *Judgment (Family Law)*.

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(Continued on reverse)

SUMMONS — AMILY LAW · CITACION JU CIAL - DERECHO DE FAMILIA

NOTICE TO RESPONDENT (Name): DONALD HERBERT SHANK
AVISO AL DEMANDADO (Nombre):

● You are being sued. ***A usted le estan demandando.***

PETITIONER'S NAME IS: GAYLE ANN SHANK
EL NOMBRE DEL DEMANDANTE ES:

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

FILED
LOS ANGELES SUPERIOR COURT

MAY 1 0 2001

JOHN A. CLARKE, CLERK
BY CARMEN MEHAFFIE, DEPUTY

CASE NUMBER: (Número del caso)
BD332896

You have **30 CALENDAR DAYS** after this Summons and Petition are served on you to file a Response (form 1282) at the court and serve a copy on the petitioner. A letter or phone call will not protect you.

If you do not file your Response on time, the court may make orders affecting your marriage, your property, and custody of your children. You may be ordered to pay support and attorney fees and costs. If you cannot pay the filing fee, ask the clerk for a fee waiver form.

If you want legal advice, contact a lawyer immediately.

Usted tiene **30 DIAS CALENDARIOS** *después de recibir oficialmente esta citación judicial y petición, para completar y presentar su formulario de Respuesta (Response form 1282) ante la corte. Una carta o una llamada telefónica no le ofrecerá protección.*

Si usted no presenta su Respuesta a tiempo, la corte puede expedir órdenes que afecten su matrimonio, su propiedad y que ordenen que usted pague mantención, honorarios de abogado y las costas. Si no puede pagar las costas por la presentación de la demanda, pida al actuario de la corte que le dé un formulario de exoneración de las mismas (Waiver of Court Fees and Costs).

Si desea obtener consejo legal, comuníquese de inmediato con un abogado.

NOTICE *The restraining orders on the back are effective against both husband and wife until the petition is dismissed, a judgment is entered, or the court makes further orders. These orders are enforceable anywhere in California by any law enforcement officer who has received or seen a copy of them.*

AVISO *Las prohibiciones judiciales que aparecen al reverso de esta citación son efectivas para ambos cónyuges, tanto el esposo como la esposa, hasta que la petición sea rechazada, se dicte una decisión final o la corte expida instrucciones adicionales. Dichas prohibiciones pueden hacerse cumplir en cualquier parte de California por cualquier agente del orden público que las haya recibido o que haya visto una copia de ellas.*

1. The name and address of the court is: *(El nombre y dirección de la corte es)*
   LOS ANGELES SUPERIOR COURT
   111 North Hill Street
   111 North Hill Street
   Los Angeles, California 90012
2. The name, address, and telephone number of petitioner's attorney, or petitioner without an attorney, is:
   (El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es)
   MARIAN L. STANTON
   STANTON LAW CORPORATION
   16530 Ventura Blvd.
   Encino, California 91436-4589
   818-906-2877
   818-[illegible]

OCT 18 2000

JOHN A. CLARKE, CLERK

(SEAL)

Date *(Fecha)*: Clerk *(Actuario)*, by _____, Deputy

NOTICE TO THE PERSON SERVED: You are served
a. ☐ as an individual.
b. ☐ on behalf of respondent
   under: ☐ CCP 416.60 (minor) ☐ CCP 416.90 (individual)
   ☐ CCP 416.70 (ward or conservatee) ☐ other:
c. ☐ by personal delivery on *(date)*:

(Read the reverse for important information)
(Lea el reverso para obtener información de importancia)

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CERTIFICATE OF SERVICE

I hereby certify that I have, at Denver, Colorado, this 27th day of March, 2002, served a true copy of the documents denominated below on the parties and/or counsel listed below by the means of service shown below:

Documents Served

EXHIBIT C TO PLAINTIFF'S SUBMISSION FOR MARCH 27, 2002 STATUS CONFERENCE

Means of Service

( ) facsimile
( ) Email
(x) U.S. Mail, Postage Prepaid (to Mr. Barnhart)
( ) Overnight Courier
(x) Hand Delivery (to Mr. Micklewright)

Counsel Served

Raymond P. Micklewright, Esq.
WOLF & SLATKIN
44 Cook Street,
Suite 1000
Denver CO 80206-5827
Telephone: 303-355-2999
Facsimile: 303-329-6826

W. Randolph Barnhart, Esq.
HILLYARD & BARNHART
7887 East Belleview Ave., Ste. 1200
Englewood CO 80111
Telephone: 303-793-0700
Facsimile: 303-793-1950
Email: rbarnhart@hblegal.com

George M. Allen

d:a\creede\141.sup

STATE OF COLORADO

DEPARTMENT OF TRANSPORTATION

REGION TRANSPORTATION DIRECTOR
REGION 5
3803 N. Main Avenue, Suite 306
Durango, CO 81301
(970) 385-1402
Fax (970) 385-1450

May 14, 2002

259-9498

Mr. Donald Shank
President and Executive Director
Denver & Rio Grande Railway
Historical Foundation
1474 Main Avenue, Suite 223
Durango, Colorado 81301

Dear Mr. Shank:

Thank you for your application for FY 2002 federal enhancement funds for the purchase of replacement railroad ties for the Denver & Rio Grande Railway Historical Foundation (DRGRHF). At this time, CDOT will not be able to provide funds for your requested project for the purchase of railroad ties for the Denver & Rio Grand Railway using fiscal year 2002 funds for the following reasons:

1. Project applications are accepted from federal, tribal, state, county or municipal governmental agencies only. Any private, non-profit or civic organizations must partner with government agencies to develop project applications and sponsorships. In the case of your railroad, since public funds are being requested to improve a private or non-profit entity, there must be adequate assurance that the improved facility will remain in public service, and not simply improved and sold at some future date. Your application did not indicate that the improved facility will remain in public service on a not-for-profit basis.

2. In Appendix A of the Transportation Enhancement Guidelines – Colorado Supplement, effective October 10, 2000, ("the Guidelines"), the description of the eligible enhancement activity Rehabilitation and Operation of Historic Transportation Buildings, Structures, or Facilities defines operation as "the provision of access and service related to contemporary transportation and non-transportation use that is consistent with the historic character of the property and open to the public on a *not-for-profit basis*" (emphasis added).

   Your application includes an advance ruling from the Internal Revenue Service that the DRGRHF was exempt from federal income tax under section 501 (c) (3) of the Internal Revenue Code. The advance ruling was to expire on December 31, 2001. You also provided a letter from the IRS dated February 15, 2002, stating, "...your organization continues to qualify for exemption form Federal income tax. However, our examination identified certain deficiencies that we are addressing in the enclosed addendum. Noncompliance with the requirements set forth in the addendum could result in penalties and/or loss of exempt status".

You did not include a copy of the addendum in your application, and we have no indication that the DRGRHF is now or will be a publicly-supported organization, or that you would operate on a not-for-profit basis.

3. Appendix B, Descriptions of Project Categories, states:

   "... the historic resources involved must be listed in the State or National Register of Historic Places, or designated as a local landmark by a certified local government or local landmark commission. An application may be submitted for historic resources in the process of being listed in the State or National Register as long as the designation is final prior to the start of the project. The application must contain a letter certifying the historic status from the State Historic Preservation Officer (SHPO) or the local landmark commission. The application must include a copy of the National Register or State Register nomination form, SHPO Cultural Resource Inventory Form and include a full description of the historic resource, its significance, and its surroundings". Your application does not include a copy of the National Register or State Register nomination form, SHPO Cultural Resource Inventory Form, and a full description of the historic resource, its significance, and its surroundings.

4. Finally, Appendix A, page 10 of the Guidelines states, "Transportation Enhancement funds should not be used for the operation and/or long-term maintenance of eligible Transportation Enhancement activities. CDOT does not encourage applicants to submit projects that will require additional future funds to complete the project. Projects must be "stand alone" projects and include a written commitment for long-term maintenance of any facility or landscaping as a result of a project. The written commitment must be from the entity that is responsible for long-term maintenance of the facility or landscaping and include the amount and source of funds to accomplish the maintenance". Your application does not specify the date you plan to open your facility to the public, or include any fiscally supported plans for long-term maintenance of the proposed improvement.

It would be inappropriate for CDOT to provide public funds for a project under these circumstances that may or may not ever be open to the public, or may or may not continue to operate as a not-for-profit. Please feel free to call me at (970) 385-1402 if you have questions.

Sincerely,

Richard Reynolds

Cc: Transportation Commissioner Parker, SLVRPC Chairman Rominger, Kumar, Bemelen, Horn, Neet, Blanz

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Honorable Robert Blackburn
United States District Judge

Honorable Craig B. Shaffer
United States Magistrate Judge

CIVIL ACTION NO. 01-RB-0318

CITY OF CREEDE,
a Colorado Municipal Corporation,

Plaintiff,

-vs-

DENVER & RIO GRANDE RAILWAY
HISTORICAL FOUNDATION,
a Colorado Not-For-Profit Corporation
and DONALD H. SHANK,

Defendants.

PLAINTIFF'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL MATERIALS

Motion For Leave To File Supplemental Materials

Plaintiff City of Creede, by its attorney, George M. Allen, hereby moves for leave to file supplemental materials pertinent to the Surface Transportation Board referral to be made by this Court pursuant to 28 U.S.C. §1336(b). The Supplemental Materials sought to be filed are attached to the memorandum brief in support of this motion as Exhibits A through H. All of these materials were copied from the records of the Colorado Department of Transportation, District 5, at Durango,

Colorado on November 7, 2002.[1] Most of these materials were created by the defendants in connection with their application to CDOT for over $ 8 million in funding for their claim that the Foundation might re-establish rail service on the Creede Branch of the former Denver & Rio Grande Western Railroad.

Grounds for this motion are stated below.

Local Rule 7.1 Compliance

The undersigned telephoned opposing counsel, Raymond Micklewright, on November 8, 2002, to learn of his position as to the filing of supplemental materials. Mr. Micklewright stated that he opposes the filing.

Grounds For The Motion

Grounds for the filing of this motion are set forth below. They are:

1. The Defendants have contended throughout this litigation that the Defendant Foundation could carry out its obligation, undertaken pursuant to its Offer of Financial Assistance authorized by the Surface Transportation Board, for provision of interstate freight rail service on the Creede Branch of the former Denver & Rio Grande Western Railway, for the relatively modest sum of $700,000.[2] The

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[1] Neither the undersigned attorney nor any official of the Plaintiff City of Creede was notified of the fact of the Foundation seeking a multi-million dollar CDOT grant on a contemporaneous basis when the initial grant application was made in early 2002. Ultimately Mayor B.J. Myers of Creede was told of the grant application by informal communication in late summer, 2002. We submitted a Colorado Open Records Law request for CDOT's records pertaining to the Foundation grant application in early November, 2002 and the records were actually copied on November 7, 2002.

[2] The $700,000 figure was asserted by Defendant Shank in his June 21, 2001 deposition. In the same deposition Mr. Shank claimed that the Foundation did not have any overall plan as to "rehab costs, operational

Supplemental Materials establish that this contention is patently false.

2. The materials we now move for leave to file are taken entirely from public record relating to the Foundation's June 14, 2002 application to the Colorado Department of Transportation (CDOT) for grants exceeding $8.1 million. The grant applications put total estimated project cost at $10.3 million for reestablishment of rail service on the Creede Branch. Thus the attached materials demonstrate that Mr. Shank's sworn deposition testimony that rail service could be reestablished for only $700,000 was to concoct a figure of only 6.8 percent of what Mr. Shank himself had already master-planned to be the real cost of reestablishment of rail service on the Creede Branch.

Since, as this Court has recognized, the STB has ultimate authority to determine whether or not to revoke the OFA rights the STB granted to the Foundation in May 2000, and since the true cost of reestablishment of such service is material to any decision the STB may make on that issue, we respectfully urge the Court to enter an order for the filing with the Court of the attached Supplemental Materials. In that fashion the Supplemental Materials can be made part of the record of this Court to be placed before the STB in this Court's 28 U.S.C. §1336(b) referral of questions and issues.

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costs, et cetera. . ."

This motion is supported by the Memorandum Brief filed in support of the Motion and by the Court's complete files and records in this action.

Request For Oral Argument

We respectfully request oral argument on this motion. Oral argument is requested because the materials sought to be filed provide a factual context for core issues to be taken up by the Surface Transportation Board in a Declaratory Order proceeding following this Court's 28 U.S.C. §1336(b) referral of questions and issues to the Board.

Respectfully submitted,

George M. Allen,
Counsel for Plaintiff City of Creede

206-A Society Drive
Telluride CO 81435
Telephone: 970-369-1000
Facsimile: 970-369-1009
Email: alnoma@yahoo.com

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Honorable Robert Blackburn
United States District Judge

Honorable Craig B. Shaffer
United States Magistrate Judge

CIVIL ACTION NO. 01-RB-0318

CITY OF CREEDE,
a Colorado Municipal Corporation,

Plaintiff,

-vs-

DENVER & RIO GRANDE RAILWAY
HISTORICAL FOUNDATION,
a Colorado Not-For-Profit Corporation
and DONALD H. SHANK,

Defendants.

MEMORANDUM BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL MATERIALS

Plaintiff City of Creede submits this Memorandum Brief in support of its Motion For Leave To File Supplemental Materials.

1. Prior Factual Background

A. The Foundation's Claim That $700,000 Could Lead To Resumption of Rail Operations

Throughout this litigation Defendant Donald Shank and his alter-ego Foundation have

contended that the Foundation is capable of rehabilitating and operating the long-dormant Creede Branch of the former Denver & Rio Grande Western Railroad. The Creede Branch extends northward from South Fork, Colorado along the upper reaches of the Rio Grande River to Creede, a distance of some 19 miles. There has been no rail service anywhere on the line since the mid 1980's and no service into Creede for a period of 30 years, dating back to 1972.[3]

The Creede Branch has six bridges over the Rio Grande River, five of which are of wood construction and all of which are over 100 years old.

Notwithstanding the long period of disuse and neglect of what was at best marginal trackage and roadbed when last in use in the mid-1980's, deposition testimony from Mr. Shank in June, 2001 included his claim that a relatively modest sum of only $700,000 would be sufficient to reestablish interstate freight rail service by his Foundation on the Creede Branch. We quote Mr. Shank's June 21, 2001 deposition testimony:

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Q. [By George Allen] So you have a document that, I presume, will be identified in your disclosures that will tell us the cost of rehabilitation and reestablishment of this right-of-way so that it can carry train traffic?

A. [By Donald Shank] Yes.

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[3] Exhibit 3 to the Plaintiff City of Creede's July 2, 2001 filing of a Motion to Enlarge Time For Response To Defendants' Motion For Referral To The Surface Transportation Board consisted of excerpts from *The Rio Grande's LaVeta Pass Route*, Evergreen Press, copyright 2000 by Stephen Rasmussen, in which the author quoted D&RGW train crews who described the uncomfortable sensation of tracks moving beneath slow-moving trains in the latter years of service on the Creede Branch. At that time the line had a 15 mph speed limit. Thereafter the tracks fell into further disrepair.

8 Q. What is that cost in that document?
9 A. The cost to rehabilitate the line,
10 based on that document, was in the vicinity of
11 $700,000.

B. Mr. Shank Testified The Foundation Had No Business Plan Addressing Rehabilitation And Operation Cost.

In his June 21, 2001 deposition, we inquired of Mr. Shank as to whether the Foundation had carried out any planning or made any studies as to the cost of reestablishment of interstate freight rail service:

Page 99
19 Q. (By Mr. Allen) Is there a business
20 plan as a single document that one can pick up and
21 say: Here is the business plan of either the
22 Foundation or of the C corp that you own?
23 A. There have been several models with
24 respect to rehab costs, operational cost, et cetera,
25 et cetera, which have been rewritten and rewritten.
Page 100
1 There's so many different drafts of that. But to
2 put it all together into one form, a business
3 plan – it's part and parcel. It's not all one
4 single entity. So, no.
5 Q. So there's no single spiral-bound thing
6 with plastic –
7 A. And a lot of fold-out, telescoping
8 pages. Not yet.

The June 21, 2002 deposition was taken after a hearing before Magistrate Judge Shaffer in which it ~~would~~ was ordered that Mr. Shank would have to give deposition testimony on several critical issues. One of those issues was the cost of reestablishment of rail service and the Foundation's ability to meet that cost.

Since the evidence was going to show – as it now has, that neither Mr. Shank (who gave the STB a useless personal guaranty of $400,000 against the Foundation's still unpaid purchase cost to the Union Pacific) nor the Foundation had any substantial assets, there was a strong incentive for Mr. Shank to mis-state the prospective cost of rehabilitation of the line and reestablishment of rail service, lest it be readily apparent that the representations of financial capability made to the STB in 1999 and 2000 were patently false and that neither the Foundation nor Mr. Shank, as ~~it~~ financial guarantor, could ever make good on the commitment to undertake interstate freight rail service.

2. Reality: The Real $10 Million Cost Of Resumption Of Rail Operations, As Disclosed By The Foundation's 2002 CDOT Funding Application.

The attached materials show that Mr. Shank and the Foundation have known all along that the real cost of rehabilitation of the Creede Branch, including repair of bridges and restoration of roadbed, ballast, ties and tracks, was going to cost millions of dollars, not the few hundred thousand dollars falsely claimed by Mr. Shank in his June, 2001 deposition. Furthermore, the attached materials show that, contrary to Mr. Shank's testimony denying the existence of planning documents, the Foundation had a Master Plan as early as 1999 from which it could project the more than $10 million cost of reestablishment of rail service into Creede.

The attached exhibits are:

Exhibit	Date	Description of Exhibit
A	June 14, 2002	**Donald Shank to CDOT Transmittal Letter** forwarding applications for CDOT Enhancement funds and referencing Denver & Rio Grande Railway Historical Foundation "Master Plan" in two separate places in the letter;
B.	June 14, 2002	**$8,094,240.00** Project Cost Funding Application (for which $6,475,392.00 is sought from CDOT) for the following purpose: "Restore the Track and Ties Between South Fork and Creede, Colorado."
C.	June 14, 2002	**$2,075,500.00** Project Cost Funding Application (for which $1,660,400 is sought from CDOT) for the following purpose: "Restore the Bridges between South Fork and Creede on the D& RG line."
D.	June 14, 2002	**$125,650.00** Project Cost Funding Application (for which $100,420.00 is sought from CDOT) for the following purpose: "Construct a Railroad Maintenance Facility."
E.	June 14, 2000	$1,000,000 Project Cost Funding Application (for which $800,000.00 is sought from CDOT) for the following purpose: "Acquire Right-of-Way between South Fork and Monte Vista, Colorado."
F.	June 14, 2002	**Attachment A - Project Description** Attachment to the above funding applications, stating in the first sentence, "In March 1999 the Denver & Rio Grande Railway Historical Foundation competed development of its Master Plan for the rehabilitation of the historic railroad between South Fork and Creede. . . The Plan itself is extensive and provides a vision for the railway for many years to come." The attachment contains four separate references to the "Master Plan" and one reference to "the Plan."
G.	September 24, 2002	**Email from Donald Shank to Laurie Blanz**. Email from Mr. Shank withdrawing Foundation application for funds from CDOT and stating that Foundation does not have funds to post a letter of credit for project as required by CDOT;
H.	August 23, 2002	**Letter from CDOT Executive Director Tom Norton** in which Mr. Norton rejects threat of highway closures if funding is not granted;

3. **Relevancy: The Supplemental Materials Establish Conclusively That The Defendants Have No Ability To Operate Rail Service And That The Obtaining Of Offer Of Financial Assistance (OFA) Rights By The Foundation Constitutes A Patent Abuse Of The OFA Process In Violation Of Established STB Precedent.**

Both sides of this litigation agree that there should be submission of certain questions and issues to the Surface Transportation Board pursuant to 28 U.S.C. §1336(b). The STB's handling of a Declaratory Order proceeding after this District Court's reference to the STB will be based on the factual record compiled in this proceeding. The Supplemental Materials establish core facts which were previously implied or suggested in prior filings by Creede, but which are now explicit and beyond dispute.

The core facts which are established by the Supplemental Materials are at least the following:

i. The cost of rehabilitation of the Creede Branch of the former D&RGW, consisting of six century-old bridges and 19 miles of roadbed and trackage, exceeds $10 million. The aggregate figure projected by the Foundation in its June 14, 2002 CDOT grant applications, based on the Foundation's 1999 Master Plan, was $10,295,390.00.

ii. The Foundation, by its own admission in its September 24, 2002 email to CDOT, withdrawing its grant application (Exhibit G), does not have any funds with which to post a letter of credit or rehabilitate and operate the Creede Branch.

iii. The Foundation has no ability to reestablish or operate interstate freight rail service to Creede. Therefore no part of the abandoned right of way within Creede will be

used by the Foundation for interstate freight rail service and the application of Creede's residential zoning will properly extend to ***all*** of the former D&RGW right of way within the town limits of Creede and not on public land.

But for the Offer of Financial Assistance rights granted by the STB to the Foundation in May, 2000, the result of the Union Pacific's filing of a Notice of Exempt Abandonment would have resulted in the formal abandonment of the Creede Branch of the D&RGW. By statute, lawful process would have then operated to cause reversion of that part of the Creede Branch within the City of Creede (and not on public land) to the City of Creede, pursuant to the 1922 reversion statute, codified as 43 U.S.C. §912.[4]

Instead of that reversion taking place, Mr. Shank and his Foundation have taken over the right of way, with a claim which must be viewed as inherently fraudulent, that the Foundation will somehow rehabilitate the six century old bridges and 19 miles of abandoned roadbed and reestablish freight rail service on the line.

Their real agenda is more perverse, but it includes at least the goal of extracting commercial rents from landowners who have structures on or adjacent to the right of way or whose roads cross the right of way. Our prior filings in this litigation have documented the fact of the Foundation's forcing of leases and obligations for lease payments on persons such as Louise Gray, a retired Creede resident living on social security who has been compelled to pay several hundred dollars per

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[4] The former D&RGW right of way within the Creede town limits crosses section 36 of Township 41 North, Range 1 East of the New Mexico Principal Meridian and extends into section 25. Section 36 is a school section, owned by the State of Colorado. The reversion statute, 43 U.S.C. §912, is applicable to the land in section 25.

year to Mr. Shank's Foundation in order to get access to her garage and the automobile she purchased with her income from scavenging aluminum cans in and around Creede.

Mr. Shank and the Foundation have also sought the filing of criminal trespass charges against, among others, the City of Creede and its maintenance personnel, for their routine clearing of culverts and drainages along the right of way.

Because more than 40 percent of the commercial district of Creede lies on the abandoned right of way, the Shank OFA initiatives have been and continue to be highly disruptive to normal commerce in Creede.

At the outset of this litigation, Judge Babcock recognized in his May 7, 2001 Order that inherent federal jurisdiction exists based on the right of the City of Creede to challenge whether the Foundation legitimately holds enforceable right of way prerogatives. Since, as Judge Babcock recognized in his May 7, 2001 Order denying remand of this action to state court, that issue is one which lies with the province of the Surface Transportation Board for determination, this is a suit which implicates federal jurisdiction.

A number of STB decisions illuminate the fundamental principle that the OFA process is not to be abused to frustrate normal operation of lawful processes. In a case arising in this jurisdiction, *Roaring Fork Railroad Holding Authority - Abandonment Exemption - In Garfield, Eagle and Pitkin Counties, CO*, STB Docket No. AB-547X (May 19, 1999), issued a ruling which, when applied to the facts now before this Court, requires a holding that if the defendant Foundation is not going to be engage in rail carriage of interstate freight shipments, it has no business operating the right of way under an Offer of Financial Assistance.

In the *Roaring Fork* case, the STB held:

> The OFA process is designed for the purpose of continuing to provide freight rail service, and is not to be used to obstruct other legitimate processes of law (whether Federal, state, or local) when continuation of such service is not likely. See *The Land Conservancy of Seattle and King County--Acquisition and Operation Exemption-- The Burlington Northern and Santa Fe Railway Company*, STB Finance Docket No. 33389 et al., slip op. at 13 (STB served May 13, 1998).[11] Accordingly, when disputed, an offeror must be able to demonstrate that its OFA is for continued rail freight service. *Union Pacific Railroad Company--Abandonment Exemption--In Lancaster County, NE*, Docket No. AB-33 (Sub-No. 71X) (ICC served Sept. 28, 1992); Conrail Abandonment West 30th Street, NY, Docket No. AB-167 (Sub-No. 493N) (ICC served Jan. 13, 1987). Where, as here, the line is not currently active, there must be some assurance that shippers are likely to make use of the line if continued service is made available, and that there is sufficient traffic to enable the operator to fulfill its commitment to provide that service. See *The Burlington Northern and Santa Fe Railway Company--Abandonment Exemption--In King County, WA*, STB Docket No. AB-6 (Sub-No. 380X), slip op. at 5 (STB served Aug. 5, 1998).[12] The record in this case does not provide such assurances. (internal footnotes omitted) [5]

The *Lancaster County, Nebraska* case, cited by the STB in its 1999 *Roaring Fork* Decision, illustrates the need to demonstrate that there will be viable shipping traffic to support a rejuvenated freight line. In *Lancaster County* the Interstate Commerce Commission held:

> * * * [t]here is no requirement that rail service be operational before an offer con be considered under the OFA procedures of section 10905. *Abandonment of R.Lines*

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[5] A copy of the STB's *Roaring Fork* decision is attached to Plaintiff City of Creede's Motion For Leave To Take Deposition of Donald H. Shank Prior To Time Established By Scheduling Order, filed in this action on or about May 16, 2001.

> and Discontinuance of Service, 365 I.C.C. 249, 260 (1981). However, in West 30th Street at 5, we stated that we had to determine whether "any shipper would make use of this line. The availability of sufficient traffic is a critical factor in determining whether [the offeror] will be able to fulfill its obligation to provide continued rail service.

Union Pacific Railroad Company--Abandonment Exemption--In Lancaster County, NE, Docket No. AB-33 (Sub-No. 71X) (ICC served Sept. 28, 1992) at page 5.[6]

The *King County* STB decision, cited in *Roaring Fork*, represents a recent and adamant holding by the STB that it will not allow its OFA processes to be used to shield activities not related

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[6] In his June 21, 2001 deposition, Mr. Shank admitted he knew of no shipper-driven demand for freight rail service in the upper Rio Grande Valley:

Page 17

Q. (By Mr. Allen) That means as of this moment, while you contemplate an undertaking to rehabilitate the rail line, you don't have any specific knowledge as to what freight may be shipped over it; is that fair to say?
A. (By Mr. Shank) Correct, that's fair to say.
Q. You don't have any knowledge as to what the revenue yield from shipping any such freight might be?
A. We have not established it at this time.
Q. Does the Foundation have any tariffs on file with the STB, Surface Transportation Board, with regard to freight shipment at the present time?
A. Not at this time.
Q. Has the Foundation done anything toward development of filing of tariffs?
A. Not at this time.
Q. Has the Foundation contracted with, hired, interviewed, or otherwise communicated with

Page 18

any person who has special knowledge or expertise with regard to formulating freight tariffs?
A. Not at this time.

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to rail transportation. In *King County* an OFA was used to transfer ownership of an abandoned right of way to an entity which undertook immediate conversion to a trail. The STB vacated the OFA and proclaimed that the OFA process might not be used for non-rail transportation purposes:

> The offer of financial assistance process envisions that a party that acquires a rail line under 49 U.S.C. 10904 continue to provide rail service. Where that is not the case, we will not allow our jurisdiction to shield a railroad, or any other party seeking relief before us, from the legitimate processes of Federal; state or local law. *See Modern Handcraft, Inc. – Aban.*, 363 I.C.C. 969 (1981) *(Modern Handcraft); Kansas City Pub. Ser. Frgt. Operation – Exempt Aban.* 7 I.C.C.2d 224-226 (1990); and *Chelsea Property Owners – Aban.– The Conrail R. Corp.*, 8 I.C.C. 2d 773, 778 (1992), *aff'd. sub nom. Conrail.*

The Land Conservancy of Seattle and King County--Acquisition and Operation Exemption-- The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 33389 et al., slip op. at 13 (STB served May 13, 1998), at page 13.

Conclusion

What is going on here is transparent. Neither the Foundation nor Mr. Shank ever had any ability to restore or operate interstate freight rail service on the Creede Branch. That undertaking would take many millions of dollars, which they knew the outset and which they recognized in the process of formulating their 1999 Master Plan.

When Creede filed this action in the District Court of Mineral County to establish the applicability of its residential zoning, to prevent commercial development along the abandoned right

of way, Mr. Shank and his Foundation removed this suit to federal court.[7] Judge Babcock denied remand on May 7, 2001, recognizing that if the Foundation had first sued in federal court to seek injunction against application of Creede's zoning on the right of way, Creede would have had a right to challenge the validity of the Foundation's OFA rights (although initial determination of that issue might have required referral to the STB under 28 U.S.C. §1336(b) under the doctrine of primary jurisdiction).

In this suit, Creede has accepted Judge Babcock's implicit invitation to challenge the bona fides of the Foundation's OFA rights and Creede seeks, in its proposed referral questions, to have the STB resolve precisely those issues.

Since this suit is the means of compiling the factual record on which the STB will ultimately act, the materials received by this Court in this suit are of great importance. The Supplemental Materials we now seek to place in the record are directly pertinent to the core issues of this litigation, since they go to the ability of the Foundation to ever establish and operate rail service on the right of way.

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[7] Last year's Eleventh Circuit decision in *Florida East Coast Ry. v. City of West Palm Beach*, 266 F.3d 1324 (11th Cir. 2001), makes it abundantly clear that Creede can apply its residential zoning to non-rail activity on the right of way within the City of Creede. A fact issue exists, of course, as to what parts of a right of way, if any, have rail activities taking place. In this litigation Creede concedes that if there were legitimate interstate freight rail activity on any part of the right of way, that part (but only that part) would be immune from Creede's zoning regulation, although Creede might well have inherent police power authority under some circumstances. Since the materials we now seek to file in the record of this action establish that the Foundation has no ability to rehabilitate the Creede Branch and establish freight rail service, the area of application of Creede's residential zoning should embrace ***all*** of the right of way within the town limits of Creede

Accordingly, we respectfully submit this Court should receive the Supplemental Materials as part of the record in this action.

Respectfully submitted,

George M. Allen,
Counsel for Plaintiff

206-A Society Drive
Telluride CO 81435
Telephone: 970-369-1000
Facsimile: 970-369-1009
Email: alnoma@yahoo.com

Denver & Rio Grande Railway Historical Foundation

A COLORADO NOT-FOR-PROFIT CORPORATION
F.E.I.N. 84-1433680

June 14, 2002

Ms. Laurie J. Blanz
Enhancement Program Manager
CDOT Region 5
3803 N. Main Ave., Suite 300
Durango, Colorado 81301

Dear Ms. Blanz,

Enclosed are five copies of the Denver & Rio Grande Railway Historical Foundation Transportation Enhancements Funds Applications for the Period July 1, 2003 through June 30, 2005. We are submitting 4 separate requests all for various portions of our Master Plan. Each request is for the rehabilitation of infrastructure that is part of our Master Plan. We realize that the funding of these requests is currently outside of the CDOT Project Plan, and that heretofore the Railway Historical Foundation was not eligible due to the requirement to have a National Historical Registration. This requirement is met during this funds application period and we respectfully request to be included in the CDOT Project Plan. We hope funds for these requests will be able to fit into the available funds that CDOT Region 5 will have over the next few years,

The Railway Historical Foundation recognizes the funding restrictions that CDOT has to deal with, we want to work with you to determine what can be accomplished and to prioritize those funds to proceed in this process to completion. Our approach of dividing this major project into many useful and effective sub-projects should help in the effectiveness of that process.

We appreciate the procedure you are following and the difficulty in applying scarce resources to all the requests you will receive. We hope to be a positive part of your program and bring benefit through this program to all the citizens of Region 5. We wish you success in your efforts to secure funding for all of your projects.

Thank you.

Sincerely,

Donald H. Shank
President and CEO

RECEIVED
JUN 14 2002
COLORADO DEPT. OF TRANSPORTATION
REGION 5
PROGRAM ENGINEER

1474 Main Avenue, Suite 223
Tel : (970) 259-9498

Durango, Colorado 81301
FAX : (970) 259-0202

404
A

TRANSPORTATION ENHANCEMENT PROGRAM APPLICATION

Colorado Department of Transportation

Please type or print legibly

APPLICANT INFORMATION

1. ELIGIBLE APPLICANT AGENCY - Indicate ONE
☒ Municipality ☐ County ☐ State Agency ☐ Federal Agency ☐ Tribal Government

2. AGENCY NAME	3. ADDITIONAL SPONSORS OR CO-SPONSORS		
Denyer & Rio Grande Railway Historical Foundation	Town Of South Fork		
4. CONTACT PERSON	TITLE	PHONE	
Don Shank	President	(970) 259-9498	
5. AGENCY MAILING ADDRESS	CITY	STATE	ZIP
1474 Main Avenue, Suite 223	Durango	CO	81301-5182

PROJECT DESCRIPTION

6. PROJECT NAME
Denver & Rio Grande Historic Railway Rehabilitation Project

7. PROJECT LOCATION/ADDRESS	8. PROJECT LIMITS (mileposts, intersecting roadways, rivers, other geographic features)		
South Fork, Colorado	To Creede, Colorado		
9. COUNTY	10. MUNICIPALITY	11. PROJECT LENGTH	
Rio Grande/Mineral	South Fork	21 Miles	

12. ONE SENTENCE DESCRIPTION OF PROJECT
Restore the Track and Ties between South Fork and Creede, Colorado

ELIGIBILITY

13. PROJECT CATEGORY - check all that apply

PEDESTRIAN & BICYCLE
- ☐ Bicycle & pedestrian facilities
- ☐ Safety & educational activities for pedestrians & bicycles
- ☐ Conversion of abandoned railway corridors to trails

HISTORIC PRESERVATION
- ☐ Acquisition of historic sites
- ☐ Historic highway programs
- ☐ Historic preservation
- ☐ Establishment of transportation museums
- ☐ Rehabilitation & operation of historic transportation buildings, structures or facilities
- ☐ Archeological planning & research

TRANSPORTATION AESTHETICS
- ☐ Acquisition of scenic easements & scenic areas
- ☐ Scenic highways programs
- ☐ Landscaping & other scenic beautification
- ☐ Provision of tourist & welcome center facilities
- ☐ Control & removal of outdoor advertising

ENVIRONMENTAL MITIGATION
- ☐ Mitigation of water pollution due to highway runoff
- ☐ Reduction of vehicle-caused wildlife mortality

FUNDING

14. TOTAL PROJECT COST	15. AMOUNT OF FEDERAL FUNDS REQUESTED	16. PREVIOUS ENHANCEMENT FUNDS AWARDED
$8,094,240.00	$6,475,392.00 too high	[illegible]
17. AMOUNT OF LOCAL MATCH FUNDS	18. SOURCE OF LOCAL MATCH FUNDS	19. DATE LOCAL MATCH FUNDS ARE AVAILABLE
$1,618,848.00	D&RG Historical Foundation	November 2001
20. AMOUNT OF OTHER FUNDING SECURED	21. SOURCE OF OTHER FUNDING	22. DATE OTHER FUNDING IS AVAILABLE
None	N/A	N/A

REQUIRED INFORMATION

23. REQUIRED ATTACHMENTS - please label attachments accordingly

- ☒ Attachment A - Description of proposed project
- ☒ Attachment B - Maps, plans and photographs
- ☒ Attachment C - Evidence of eligibility by project category
- ☒ Attachment D - Benefits of proposed project
- ☒ Attachment E - Environmental Review
- ☒ Attachment F - Budget and implementation schedule
- ☒ Attachment G - Proposed maintenance plans, agreements, covenants
- ☒ Attachment H - Resolutions of support and letters of approval
- ☒ Attachment I - Right-of-way acquisition or legal property description

SIGNATURE

4. AUTHORIZED AGENCY REPRESENTATIVE	TITLE
Don Shank	President
5. SIGNATURE	DATE
[signature]	06-14-02

CDOT USE ONLY

CDOT RTD OR DESIGNEE/TITLE/DATE	STIP #	PROJECT #
TRANSPORTATION ENHANCEMENT PROGRAM MANAGER/TITLE/DATE	PROJECT NAME	
CDOT RESIDENT OR PROGRAM ENGINEER/TITLE/DATE	☐ Approved ☐ Disapproved	

405

Submit completed application & supporting documentation to the CDOT Transportation Enhancement Program Manager in your Region.

Appendix D

B

TRANSPORTATION ENHANCEMENT PROGRAM APPLICATION

Colorado Department of Transportation

Please type or print legibly

APPLICANT INFORMATION

1. ELIGIBLE APPLICANT AGENCY – indicate ONE
☒ Municipality ☐ County ☐ State Agency ☐ Federal Agency ☐ Tribal Government

2. AGENCY NAME	3. ADDITIONAL SPONSORS OR CO-SPONSORS		
Denver & Rio Grande Railway Historical Foundation	Town Of South Fork		
4. CONTACT PERSON	TITLE	PHONE	
Don Shank	President	(970) 259-9498	
5. AGENCY MAILING ADDRESS	CITY	STATE	ZIP
1474 Main Avenue, Suite 223	Durango	CO	81301-5182

PROJECT DESCRIPTION

6. PROJECT NAME
Denver & Rio Grande Historic Railway Rehabilitation Project

7. PROJECT LOCATION/ADDRESS	8. PROJECT LIMITS (mileposts, intersecting roadways, rivers, other geographic features)	
South Fork, Colorado	To Creede, Colorado	
9. COUNTY	10. MUNICIPALITY	11. PROJECT LENGTH
Rio Grande/Mineral	South Fork	21 Miles

12. ONE SENTENCE DESCRIPTION OF PROJECT
Restore the Bridges between South Fork and Creede on the D&RG line.

ELIGIBILITY

13. PROJECT CATEGORY – check all that apply

PEDESTRIAN & BICYCLE
- ☐ Bicycle & pedestrian facilities
- ☐ Safety & educational activities for pedestrians & bicycles
- ☐ Conversion of abandoned railway corridors to trails

HISTORIC PRESERVATION
- ☐ Acquisition of historic sites
- ☐ Historic highway programs
- ☐ [illegible]ic preservation
- ☐ [illegible]ishment of transportation museums
- ☐ [illegible]abilitation & operation of historic transportation buildings, structures or facilities
- ☐ Archeological planning & research

TRANSPORTATION AESTHETICS
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- ☐ Landscaping & other scenic beautification
- ☐ Provision of tourist & welcome center facilities
- ☐ Control & removal of outdoor advertising

ENVIRONMENTAL MITIGATION
- ☐ Mitigation of water pollution due to highway runoff
- ☐ Reduction of vehicle-caused wildlife mortality

FUNDING

14. TOTAL PROJECT COST	15. AMOUNT OF FEDERAL FUNDS REQUESTED	16. PREVIOUS ENHANCEMENT FUNDS AWARDED
$2,075,500.00	$1,660,400.00	None
17. AMOUNT OF LOCAL MATCH FUNDS	18. SOURCE OF LOCAL MATCH FUNDS	19. DATE LOCAL MATCH FUNDS ARE AVAILABLE
$415,100.00	D&RG Historical Foundation	November 2001
20. AMOUNT OF OTHER FUNDING SECURED	21. SOURCE OF OTHER FUNDING	22. DATE OTHER FUNDING IS AVAILABLE
None	N/A	N/A

REQUIRED INFORMATION

23. REQUIRED ATTACHMENTS – please label attachments accordingly

- ☒ Attachment A – Description of proposed project
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- ☒ Attachment I – Right-of-way acquisition or legal property description

SIGNATURE

24. AUTHORIZED AGENCY REPRESENTATIVE	TITLE
Don Shank	President
25. SIGNATURE	DATE
[signature]	06-14-02

CDOT USE ONLY

CDOT RTD OR DESIGNEE/TITLE/DATE	STIP #	PROJECT #
TRANSPORTATION ENHANCEMENT PROGRAM MANAGER/TITLE/DATE	PROJECT NAME	
CDOT RESIDENT OR PROGRAM ENGINEER/TITLE/DATE	☐ Approved ☐ Disapproved	406

Submit completed application & supporting documentation to the CDOT Transportation Enhancement Program Manager in your Region.
Appendix D

C

TRANSPORTATION ENHANCEMENT PROGRAM APPLICATION

Colorado Department of Transportation

Please type or print legibly

APPLICANT INFORMATION

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☒ Municipality ☐ County ☐ State Agency ☐ Federal Agency ☐ Tribal Government

2. AGENCY NAME	3. ADDITIONAL SPONSORS OR CO-SPONSORS		
Denver & Rio Grande Railway Historical Foundation	Town Of South Fork		
4. CONTACT PERSON	TITLE	PHONE	
Don Shank	President	(970) 259-9498	
5. AGENCY MAILING ADDRESS	CITY	STATE	ZIP
1474 Main Avenue, Suite 223	Durango	CO	81301-5182

PROJECT DESCRIPTION

5. PROJECT NAME
Denver & Rio Grande Historic Railway Rehabilitation Project

7. PROJECT LOCATION/ADDRESS	8. PROJECT LIMITS (mileposts, intersecting roadways, rivers, other geographic features)
South Fork, Colorado	To Creede, Colorado

9. COUNTY	10. MUNICIPALITY	11. PROJECT LENGTH
Rio Grande/Mineral	South Fork	21 Miles

12. ONE SENTENCE DESCRIPTION OF PROJECT
Construct a Railroad Maintenance Facility

ELIGIBILITY

13. PROJECT CATEGORY - check all that apply

PEDESTRIAN & BICYCLE
- ☐ Bicycle & pedestrian facilities
- ☐ Safety & educational activities for pedestrians & bicycles
- ☐ Conversion of abandoned railway corridors to trails

HISTORIC PRESERVATION
- ☐ Acquisition of historic sites
- ☐ Historic highway programs
- ☐ Historic preservation
- ☐ Establishment of transportation museums
- ☐ Rehabilitation & operation of historic transportation buildings, structures or facilities
- ☐ Archeological planning & research

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- ☐ Scenic highways programs
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- ☐ Provision of tourist & welcome center facilities
- ☐ Control & removal of outdoor advertising

ENVIRONMENTAL MITIGATION
- ☐ Mitigation of water pollution due to highway runoff
- ☐ Reduction of vehicle-caused wildlife mortality

FUNDING

14. TOTAL PROJECT COST	15. AMOUNT OF FEDERAL FUNDS REQUESTED	16. PREVIOUS ENHANCEMENT FUNDS AWARDED
$125,650.00	$100,520.00	None
17. AMOUNT OF LOCAL MATCH FUNDS	**18. SOURCE OF LOCAL MATCH FUNDS**	**19. DATE LOCAL MATCH FUNDS ARE AVAILABLE**
$25,130.00	D&RG Historical Foundation	November 2001
20. AMOUNT OF OTHER FUNDING SECURED	**21. SOURCE OF OTHER FUNDING**	**22. DATE OTHER FUNDING IS AVAILABLE**
None	N/A	N/A

REQUIRED INFORMATION

REQUIRED ATTACHMENTS - please label attachments accordingly

- Attachment A - Description of proposed project
- Attachment B - Maps, plans and photographs
- Attachment C - Evidence of eligibility by project category
- Attachment D - Benefits of proposed project
- Attachment E - Environmental Review
- ☒ Attachment F - Budget and implementation schedule
- ☒ Attachment G - Proposed maintenance plans, agreements, covenants
- ☒ Attachment H - Resolutions of support and letters of approval
- ☒ Attachment I - Right-of-way acquisition or legal property description

SIGNATURE

AUTHORIZED AGENCY REPRESENTATIVE	TITLE
Don Shank	President
SIGNATURE	DATE
Don Shank	06-14-02

CDOT USE ONLY

RTD OR DESIGNEE/TITLE/DATE	STIP #	PROJECT #
TRANSPORTATION ENHANCEMENT PROGRAM MANAGER/TITLE/DATE	PROJECT NAME	407
RESIDENT OR PROGRAM ENGINEER/TITLE/DATE	☐ Approved ☐ Disapproved	

Submit completed application & supporting documentation to the CDOT Transportation Enhancement Program Manager in your Region.

Appendix D

D

TRANSPORTATION ENHANCEMENT PROGRAM APPLICATION

Colorado Department of Transportation

Please type or print legibly

APPLICANT INFORMATION

1. ELIGIBLE APPLICANT AGENCY - indicate ONE
☒ Municipality ☐ County ☐ State Agency ☐ Federal Agency ☐ Tribal Government

2. AGENCY NAME	3. ADDITIONAL SPONSORS OR CO-SPONSORS		
Denver & Rio Grande Railway Historical Foundation	Town Of South Fork		
4. CONTACT PERSON	TITLE	PHONE	
Don Shank	President	(970) 259-9498	
5. AGENCY MAILING ADDRESS	CITY	STATE	ZIP
1474 Main Avenue, Suite 223	Durango	CO	81301-5182

PROJECT DESCRIPTION

6. PROJECT NAME		
Denver & Rio Grande Historic Railway Rehabilitation Project		
7. PROJECT LOCATION/ADDRESS	8. PROJECT LIMITS (mileposts, intersecting roadways, rivers, other geographic features)	
South Fork, Colorado	To Creede, Colorado	
9. COUNTY	10. MUNICIPALITY	11. PROJECT LENGTH
Rio Grande/Mineral	South Fork	21 Miles

12. ONE SENTENCE DESCRIPTION OF PROJECT
Acquire Right-of-Way between South Fork and Monte Vista, Colorado

ELIGIBILITY

13. PROJECT CATEGORY - check all that apply

PEDESTRIAN & BICYCLE
- ☐ Bicycle & pedestrian facilities
- ☐ Safety & educational activities for pedestrians & bicycles
- ☐ Conversion of abandoned railway corridors to trails

HISTORIC PRESERVATION
- ☐ Acquisition of historic sites
- ☐ Historic highway programs
- ☐ [illegible]oric preservation
- ☐ [illegible]blishment of transportation museums
- ☐ Rehabilitation & operation of historic transportation buildings, structures or facilities
- ☐ Archeological planning & research

TRANSPORTATION AESTHETICS
- ☐ Acquisition of scenic easements & scenic areas
- ☐ Scenic highways programs
- ☐ Landscaping & other scenic beautification
- ☐ Provision of tourist & welcome center facilities
- ☐ Control & removal of outdoor advertising

ENVIRONMENTAL MITIGATION
- ☐ Mitigation of water pollution due to highway runoff
- ☐ Reduction of vehicle-caused wildlife mortality

FUNDING

14. TOTAL PROJECT COST	15. AMOUNT OF FEDERAL FUNDS REQUESTED	16. PREVIOUS ENHANCEMENT FUNDS AWARDED
$1,000,000.00	$800,000.00	None
17. AMOUNT OF LOCAL MATCH FUNDS	18. SOURCE OF LOCAL MATCH FUNDS	19. DATE LOCAL MATCH FUNDS ARE AVAILABLE
$200,000.00	D&RG Historical Foundation	November 2001
20. AMOUNT OF OTHER FUNDING SECURED	21. SOURCE OF OTHER FUNDING	22. DATE OTHER FUNDING IS AVAILABLE
None	N/A	N/A

REQUIRED INFORMATION

23. REQUIRED ATTACHMENTS - please label attachments accordingly

- ☒ Attachment A - Description of proposed project
- ☒ Attachment B - Maps, plans and photographs
- ☒ Attachment C - Evidence of eligibility by project category
- ☒ Attachment D - Benefits of proposed project
- ☒ Attachment E - Environmental Review
- ☒ Attachment F - Budget and implementation schedule
- ☒ Attachment G - Proposed maintenance plans, agreements, covenants
- ☒ Attachment H - Resolutions of support and letters of approval
- ☒ Attachment I - Right-of-way acquisition or legal property description

SIGNATURE

24. AUTHORIZED AGENCY REPRESENTATIVE	TITLE
Don Shank	President
25. SIGNATURE	DATE
[signature]	06-14-02

CDOT USE ONLY

CDOT RTD OR DESIGNEE/TITLE/DATE	STIP #	PROJECT #
TRANSPORTATION ENHANCEMENT PROGRAM MANAGER/TITLE/DATE	PROJECT NAME	408
CDOT RESIDENT OR PROGRAM ENGINEER/TITLE/DATE	☐ Approved ☐ Disapproved	

Submit completed application & supporting documentation to the CDOT Transportation Enhancement Program Manager in your Region.

Appendix D

E

ATTACHMENT A
Project Description

In March 1999 the Denver & Rio Grande Railway Historical Foundation completed development of its Master Plan for the rehabilitation of the historic railroad between South Fork and Creede. Now we are in the process of implementing that Master Plan. The Plan itself is extensive and provides a vision for the railway for many years to come. It would not be appropriate or reasonable to expect that such a comprehensive plan could be implemented in a short two-year span. Therefore, the D&RG Railway is working with all parties to bring progress to this implementation and to see that the vision of the Master Plan is fulfilled. The Colorado Department of Transportation (CDOT) is an intrinsic part of this vision. The Plan is accomplished in meaningful steps, allowing for the availability of funds, and the achievement of priorities within this implementation, with the available resources.

Our requests for financial assistance for this period are divided into four separate projects within the Master Plan. These projects exclusively focus on the infrastructure of the railroad, which is the core of the efforts needed to restore the D&RG in the western San Luis Valley. Please refer to the Denver & Rio Grande Railway Historical Foundation Master Plan (If you do not have a copy of this plan, please contact Don Shank in Durango at (970) 259-9498 to get a copy) the specific sections we are either attempting to complete or are initiating here for the first time are as follows:

1. Restore the Track and Ties between South Fork and Creede, Colorado. This is a distance of approximately 21 miles.
2. Restore the bridges between South Fork and Creede.
3. Construct a Railroad Maintenance Facility
4. Acquire Right-of-Way between South Fork and Monte Vista, Colorado

need more detailed descriptions

These four projects are presented as the core capabilities necessary to preserve this historical line for operation.

See Attached Letter from the Colorado Historical Society

The attached letter from Mr. Dale Heckendorn confirms that the D&RG Railway Historical Foundation has applied for and expects to receive registration on the National Historic Registry. That registration should occur in October 2002.

Blanz, Laurie

From: Donald Shank [drghf@frontier.net]
[redacted]
Tuesday, September 24, 2002 12:05 PM
Blanz, Laurie
Subject: Re: Denver & Rio Grande Railway Historical Foundation enhancement application

Hi Laurie,

Per conversations with Terry Whelan, Town Manager of South Fork and our atty, DRGHF is hereby withdrawing from the CDOT Enhancement Program. The demands placed upon us are simply unrealistic. Case-in-point, The final requirement from Tom Norton for a letter of credit sufficient to cover rehab, equipment, maintenance and operation. If we had that we wouldn't need enhancement funds, would we? Additionally, South Fork cannot provide a resolution stating they accept responsibility for the long-term operation of the facility (railroad). That is unrealistic.

In view of these demands, DRGHF formally withdraws its applications. Thank you Laurie. I am sure you more than understand.

Don Shank
Executive Director, DRGHF

[redacted]
Blanz, Laurie writes:

> Don,
>
> This is a followup to the SLV Regional Planning Commission meeting that was held on August 27th and our phone conversation yesterday. Please provide the following information to me by Oct. 14th, so I have time to review it before the next RPC meeting on Oct. 21st for the selection and prioritization of projects:
>
> * The applications must be sponsored by a governmental entity.
> * Provide more detailed descriptions of the individual projects.
> * State the enhancement activity under which each proposed project is eligible.
> * Provide the status of your efforts to list the railroad on the National Register of Historic Places.
> * Provide revised, reasonable funding requests, taking into consideration the limited Region 5 enhancement funding.
> * Provide detailed cost estimates.
> * Provide an implementation schedule for the proposed projects, as well as the start date of railroad operation.
> * Provide a statement that the local agency will provide all required environmental clearances.
> * Attach a resolution of support from the Town of South Fork: 1) attesting to their lead role in the project, and 2) a statement that they are responsible for the long-term operation of the facility.
> * Provide letters of support from Creede.
> * Attachment I says the railroad property belongs to Union Pacific Railroad. State whether or not this is correct and provide the name of the owner, if Attachment I is incorrect.
> * Provide a letter of credit or bond, subject to the approval by CDOT, sufficient to cover the costs of

410

G

track/structure rehabilitation, rolling stock, and maintenance and operation of the facilities, as required by Tom Norton in his letter to you dated August 23, 2002.
>
> Thank you and please call me at (970)385-1435 with any questions,
> Laurie
>
>

411

STATE OF COLORADO

DEPARTMENT OF TRANSPORTATION
Executive Director
Tom Norton
4201 E. Arkansas Avenue, Room 262
Denver, CO 80222
(303) 757-9201
(303) 757-9656 Fax

August 23, 2002

Mr. Don Shank, President
Denver and Rio Grande Railway Foundation
1474 Main Street, Suite 223
Durango, Co 81301-5195

Dear Mr. Shank:

I have reviewed your letter to me dated May 30, 2002, as well as your letters of May 16, 2002 to Richard Reynolds and June 14, 2002 to Laurie Blanz. It would be beneficial to clarify several initial points. The selection process for enhancement projects calls for the submission of applications, a review by CDOT staff, and presentation to the Transportation Planning Region for their prioritization. Unfortunately, this process was not followed at the San Luis Valley Transportation Planning Region meeting where the TPR voted to award funding to your railroad, prior to your submission of any application. Had you submitted the application and received staff review, perhaps much of this confusion could have been avoided.

The enhancement program guidelines adopted by CDOT, dated October 10, 2000, potentially allows for the funding of this type of project in the activities of 6. Historic Preservation and 7. Rehabilitation and Operation of Historic Transportation Buildings, Structures, or Facilities (Appendix A). As outlined in these guidelines, all projects must fall into one of the following four project categories: Pedestrian and Bicycle Facilities; Historic Preservation; Transportation Aesthetics; Environmental Mitigation. The project you suggest most appropriately falls in the category of Historic Preservation. These guidelines further state that the Transportation Enhancement Program does not normally fund rehabilitation, restoration, or stabilization work on privately-owned resources. Your railroad is privately owned. In reading the guidelines under the two activities listed above, any application is to be reviewed by the State Historic Preservation Officer or the local landmark commission before the submission of any application. Once again this was not done.

It is our understanding that on August 2, 2002, the Colorado Historic Preservation Review Board considered your request for the Creede Branch of the Denver & Rio Grande Railroad to be designated as historic and recommended the inclusion of the railroad on the National Register of Historic Places. This nomination to the National Park Service covers the railroad right-of-way, from South Fork to Creede and generally 50 feet from the track centerline and 100 feet from the

track centerline in the Creede area. CDOT has been informed that the Park Service should respond to this nomination in the next 60 days. For both activity 6 and 7 projects, as detailed above, inclusion in the State or National Registers of Historic Places or designation as a landmark or historic district by a local government or a landmark commission is a prerequisite to receiving enhancement funding.

In further reviewing the Enhancement Guidelines, there are a number of questions that remain unanswered in the application you submitted following the Transportation Planning Region meeting, including: Purpose of the project; Quality of the project; Cost of the project; Environmental sensitivity; Implementation and maintenance; and Local support. We will need responses to these questions in order to fully evaluate your application.

Given the purpose of the enhancement program and the above guidelines, a concern exists over awarding your railroad enhancement funding and the appropriateness of expending of federal dollars. Public funding is not normally expended on a privately owned facility, as acknowledged by the enhancement guidelines. The Colorado Constitution, Article XI, Section 2, generally prohibits the expenditure of public funds on private corporations. As trustee for federal funds, CDOT needs assurance that this will be a wise expenditure in terms of benefit to the public and assurance that this railroad will, in fact, operate and remain open to the public on a not-for-profit basis, again a requirement of the enhancement guidelines. To this end, proof of your financial ability to operate this railroad in the form of a bond or letter of credit, subject to the approval of CDOT, sufficient to cover the costs of track/structure rehabilitation, rolling stock, maintenance and operating facilities will be necessary prior to the commitment of public funds.

Enhancement project applications are received only from government agencies, although a partnership with a private, non-profit agency is allowed. The government entity must be involved in a lead role and have the authority to contract with the State. We will need a resolution from the Town of South Fork attesting to their lead role in this project and a statement of their commitment to the long-term operation of this facility.

You have submitted four additional enhancement funding applications in the name of the Denver & Rio Grande Railway Historical Foundation, requesting over $9 million in federal funding for track and bridge rehabilitation, maintenance facility construction, and purchase of right-of-way. Please again note that project applications are only accepted from federal, tribal, state, county or municipal governmental agencies. Private, non-profit, and civic organizations must partner with government agencies to develop project applications. Each of these applications will be reviewed against the above guidelines.

With respect to the statements in your letter relative to the maintenance of railroad/highway crossing agreements, and also the statement in your May 16, 2002 letter addressed to Richard Reynolds, that 'perhaps DRGHF will be forced to close the crossings as they will no longer be covered by these agreements', I can assure you this issue has been reviewed by the State of Colorado Attorney General's Office and any such attempt to interfere with the operation of State Highway 149 will be countered with all available legal recourse, including the exercise of eminent domain.

In summary, CDOT staff review of all applications must occur prior to the review by the Transportation Planning Region and their priority recommendations; the railroad must receive historical designation or listing on the State or National Register of Historic Places; applications

must be submitted by a government agency; there must be a resolution from the government agency of continuing support for this project; there must be assurance that you have sufficient resources to operate this railroad and render the public expenditure of funds appropriate. Please work with Laurie Blanz with our Region 5 Engineering Office in the provision of the requested information. Every effort will be made to expedite the review of your application and the appropriateness of expending public funds.

Sincerely.

Tom Norton

Tom Norton

Transportation Commissioner Steve Parker
First Assistant Attorney General Harry Morrow
SLVTPR Chair Vern Rominger
Richard Reynolds

CERTIFICATE OF SERVICE

I hereby certify that I have, at Telluride, Colorado this 12th day of November, 2002, served a true copy of the documents denominated below on the parties and/or counsel listed below by the means of service shown below:

Documents Served

PLAINTIFF'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL MATERIALS;

MEMORANDUM BRIEF IN SUPPORT OF PLAINTIFF'S MOTION TO FILE SUPPLEMENTAL MATERIALS

Means of Service

( ) facsimile
(x) Email to Mr. Micklewright
(x) U.S. Mail, Postage Prepaid
( ) Overnight Courier
( ) Hand Delivery

Counsel Served

Raymond P. Micklewright, Esq.
WOLF & SLATKIN
44 Cook Street,
Suite 1000
Denver CO 80206-5827
Telephone: 303-355-2999
Facsimile: 303-329-6826

W. Randolph Barnhart, Esq.
HILLYARD & BARNHART
7887 East Belleview Ave., Ste. 1200
Englewood CO 80111
Telephone: 303-793-0700
Facsimile: 303-793-1950
Email: rbarnhart@hblegal.com

George M. Allen

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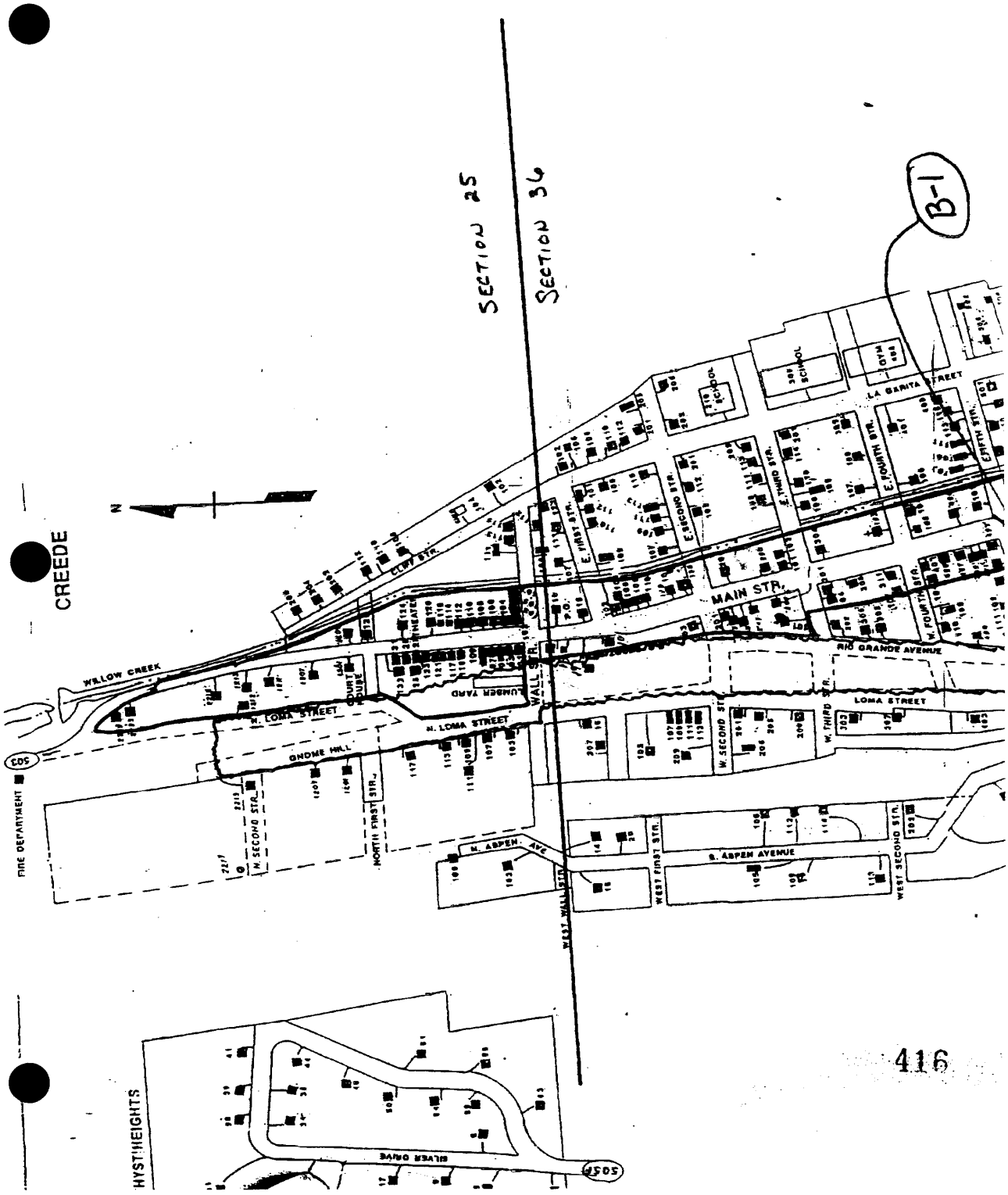
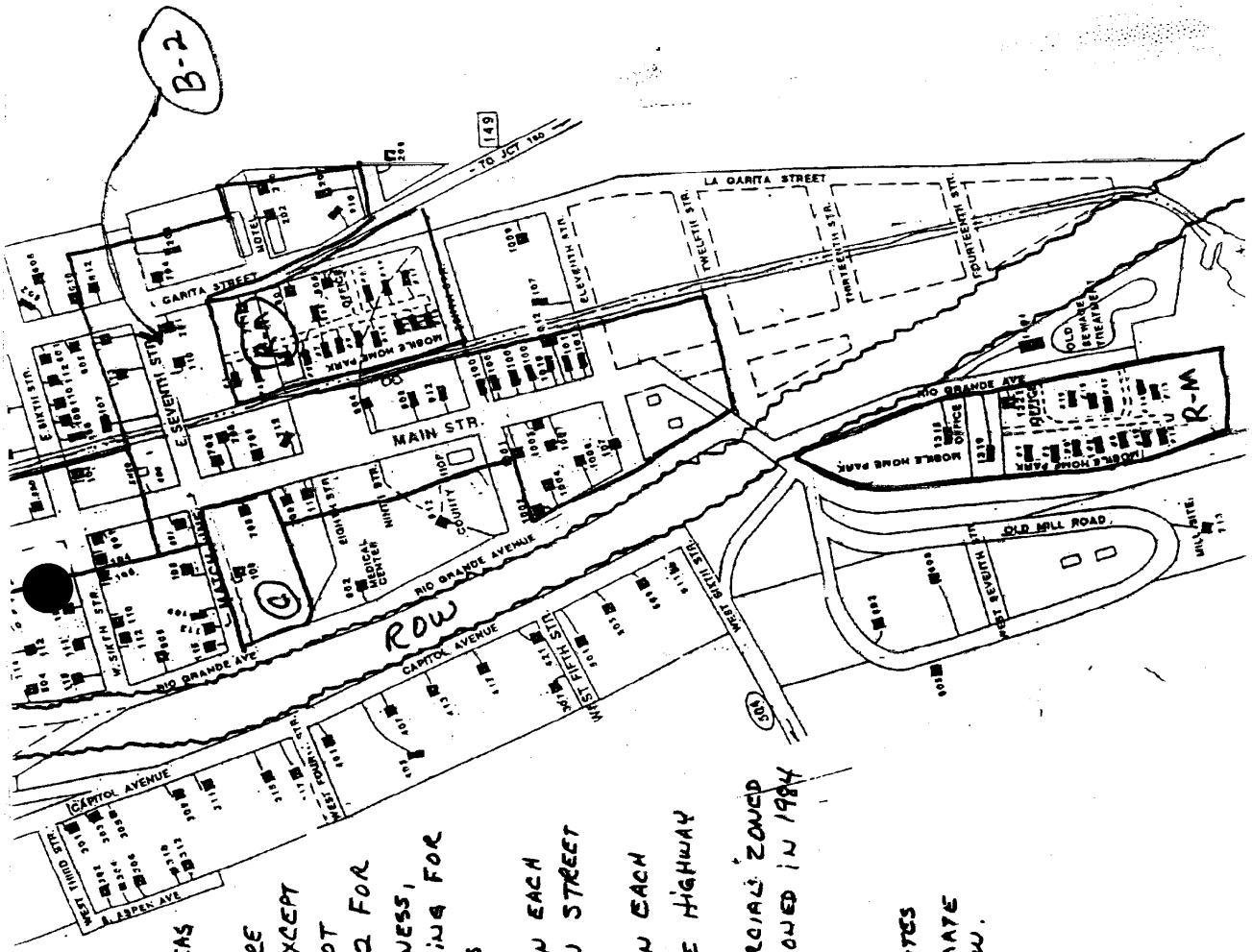

B-1
SECTION 25
SECTION 36
CREEDE
N
MAIN STR.
RIO GRANDE AVENUE
LOMA STREET
N. LOMA STREET
W. LOMA STREET
WILLOW CREEK
GNOME HILL
NORTH FIRST STR.
W. SECOND STR.
E. SECOND STR.
E. THIRD STR.
E. FOURTH STR.
W. THIRD STR.
W. SECOND STR.
WEST FIRST STR.
WEST SECOND STR.
WEST WALL STR.
N. ASPEN AVE.
S. ASPEN AVENUE
LA SANITA STREET
CLIFF STR.
WALL STR.
LUMBER YARD
FIRE DEPARTMENT
SCHOOL
GYM
HYSTHEIGHTS
SILVER DRIVE
50
416



B-1, B-2 AND COMMERCIAL AREAS MARKED - ALL OTHER AREAS ARE ZONED R-1 EXCEPT FOR A FEW SPOT ZONING TO R-2 FOR IN-HOME BUSINESS, AND R-M ZONING FOR TRAILER HOMES

B-1 IS 50' ON EACH SIDE OF MAIN STREET

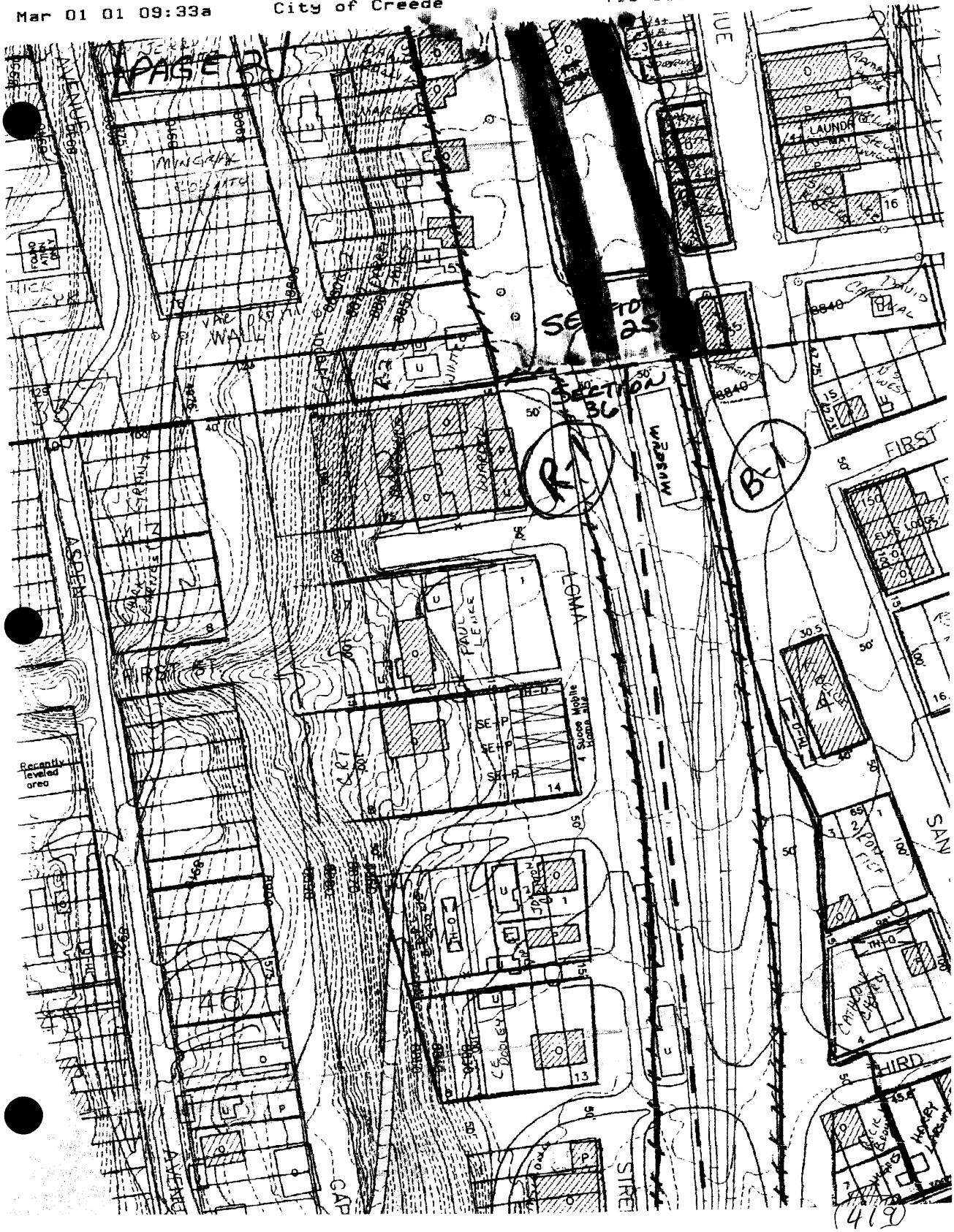
B-2 IS 50' ON EACH SIDE OF THE HIGHWAY

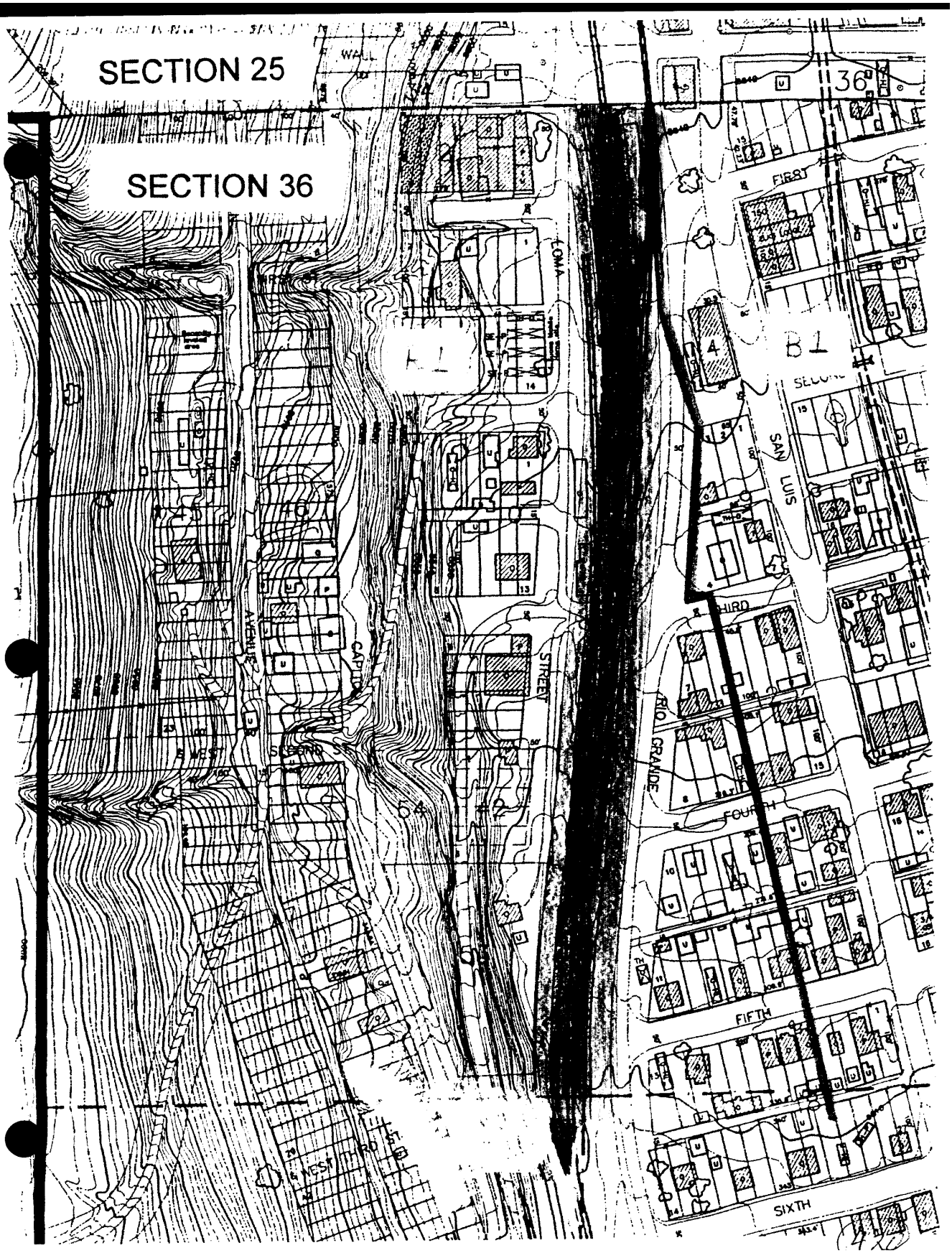
THE 1 COMMERCIAL ZONED BLOCK WAS ZONED IN 1984

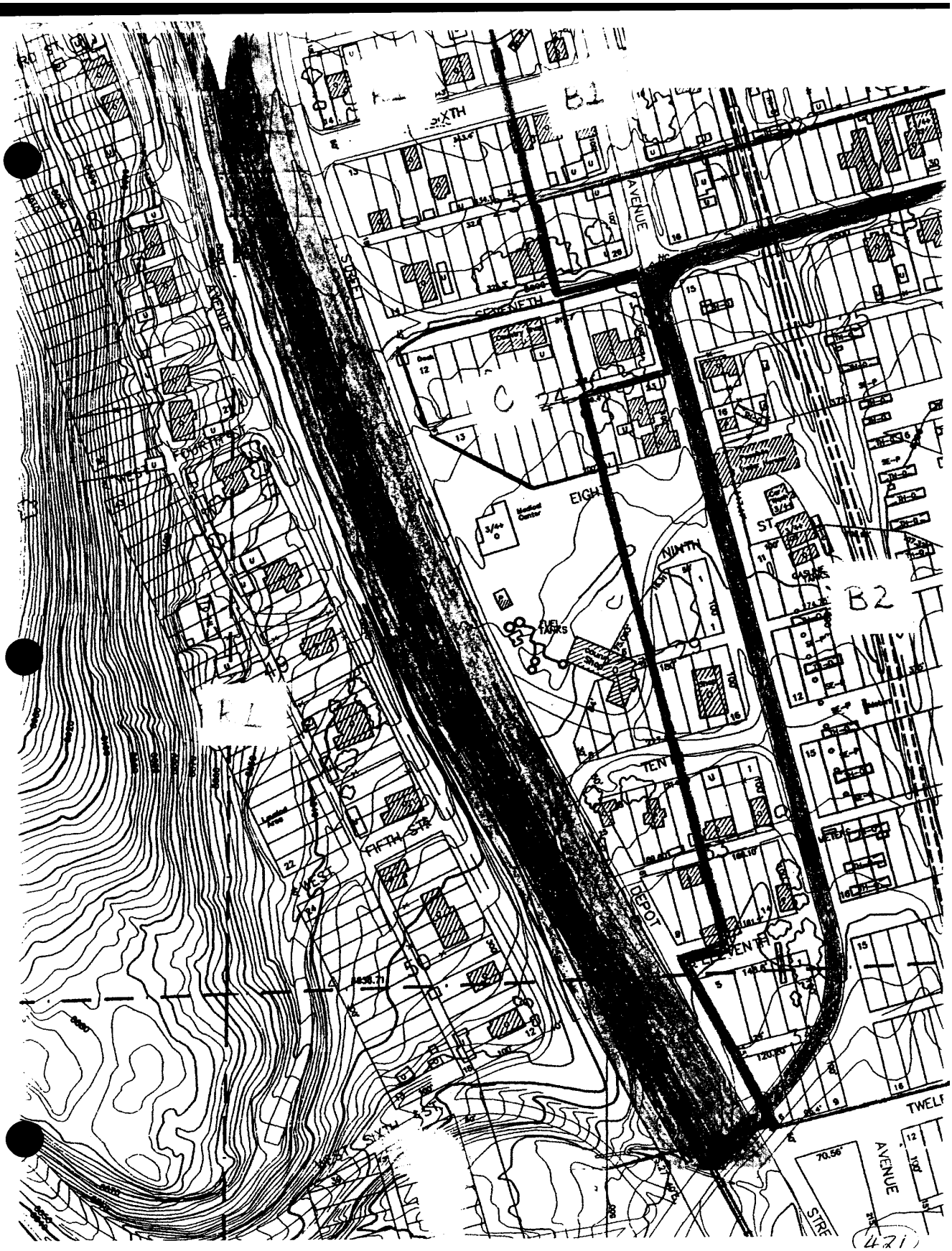
---- INDICATES THE APPROXIMATE LINES OF ROW.

PAGE 1
R-1
END OF ROW
CHESTNUT
NORTH
DRIVE
SKROCH
6
12
21
20
11
10
30
CITY SHOP
CITY
DICK MORTON
14
COURT-HOUSE
3/44
B-1
HENRY HOSSELKUS
HARRY HOSSELKUS
JERRY WANTZ
MERYE KNOUS
3

418


PAGE 2
SECTION 25
SECTION 36
R-1
B-1
MUSEUM
LOMA
FIRST
ASPEN
Recently leveled area
4 Succe Mobile Home site
LAUNDR
FOUND ATION ONLY
MINERAL COUNTY
VAC PRETTY WALL
PAUL LEWIS
CLE DOOLEY
ELKS LODGE
CATHOLIC CHURCH
HIRD
SAN
STRE
GAP
AVENUE
419


SECTION 25
SECTION 36
WALL
LOMA
FIRST
SAN LUIS
STREET
RIO GRANDE
FOURTH
FIFTH
SIXTH
36
B1
A1
54
42


B1
B2
C
SIXTH
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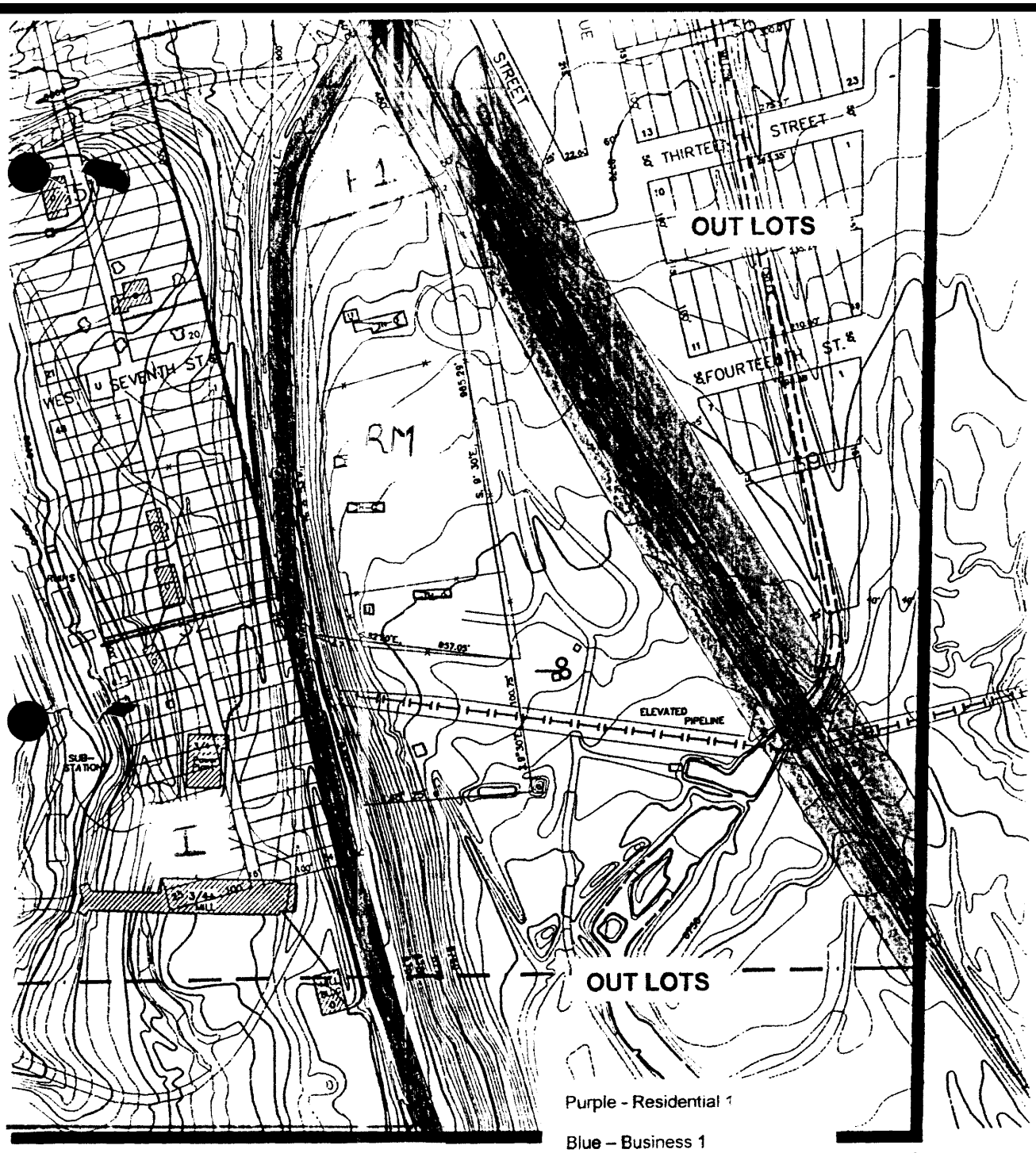
TEN
DEPOT
FIFTH ST
WEST
TWELF
AVENUE
STRE
FOURTH
Medical Center
FUEL TANKS
GASLINE TANKS
Landed Area
70.56'
421



RIGHT-OF-WAY in Section 36

Orange - 25', including the track
Green - Entire ROW

- 100' from the North Boundary of Section 36, south to approximately South Fifth Street
- 125' from approximately South Fifth Street to the southern City Limits

Purple - Residential 1

Blue – Business 1

Brown – Business 2

Yellow – Residential Mobil Home

Dark Green – Industrial

Gray – Highway 149

Red – Commercial

422