

BEFORE THE SURFACE TRANSPORTATION BOARD
OF THE UNITED STATES



CITY OF CREEDE, CO,
Petitioner,

FINANCE DOCKET NO. 343769

DENVER & RIO GRANDE
RAILWAY HISTORICAL
FOUNDATION, INC.,
Respondent

PETITION FOR
DECLARATORY ORDER

UNION PACIFIC RAILROAD
COMPANY - ABANDONMENT
EXEMPTION - IN RIO GRANDE
AND MINERAL COUNTIES, CO

DOCKET NO. AB-33
(SUB-NO. 132X)

209/170
ENTERED
Office of Proceedings

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Public Record

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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:

Page 52

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

4 A Well, the [railroad] cars technically are owned by the
5 Catholic church. They're utilized by a youth camp as
6 interim housing. Although they're not user friendly, they
7 recognize that they have far more historic value to a
8 railroad than they do to a youth camp. So it's a situation \
9 where they still are working to acquire the camp from the
10 Catholic church. And once that is complete, they're
11 donating the cars to the Foundation.
12 Q Who's "they"?
13 A Mountain Trails Youth Camp.
14 Q Okay. Where is it located?
15 A The office for the Mountain Trails is in
16 Monte Vista.
17 Q Going down to "railroad memorabilia and
18 artifacts."
19 A Yes.
20 Q Lantern collection.
21 A Uh-huh.
22 Q Is that actually owned by the Foundation?
23 A It is.
24 Q "Photographic and 8 millimeter movie
25 collection." Is that owned by the Foundation?

Page 53

1 A Yes.
2 Q "Historic paper collection"?
3 A It is.
4 Q "Associated artifacts, switch stands, rail,
5 spikes, car seals," etc. Is that owned by the Foundation?
6 A It is.
7 Q Would this \$65,000 value be, on those
8 aggregate items, memorabilia and artifacts, be a valid
9 number running pretty much continuously from 1998 when this
10 was done through '99 or 2000 when you acquired the OFA 11 rights?
12 A Yes. That would be a minimum value.
13 Q Would it be about the same value today?
14 A Certainly. Every bit of that.
15 Q Tell me; does the Foundation have things
16 like this insured? Do you carry insurance on it?
17 A It's carried under insurance and in its
18 present location by the donor, by donors. The Foundation,
19 at this time, is not housing this collection on a
20 Foundation site.

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

Page 54

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

Page 55

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

9 Q (By Mr. Allen) Okay. Let's move to the
10 "model railroad collection." I see three line items,
11 "Lionel Train collection, American Flyer collection and SA3
12 N scale and miscellaneous" totaling \$152,000. Were those
13 items, in November of '98, in the physical possession of
14 the Foundation?
15 A Not in the physical possession, but readily
16 available.
17 Q Have they been transferred to the Foundation
18 in terms of legal title to them?
19 A Verbalized, but not in a formal document.
20 Q Who is the donor or the holder of those
21 items or holders, plural, if it's more than one?
22 A My father, my brother, and myself.
23 Q Do you know whether any of those three
24 individuals, your father, brother, yourself, have taken tax
25 deductions for donations to the Foundation for these items?

Page 56

1 A We have not.
2 Q Do you know whether or not the donors of the
3 railroad memorabilia and artifacts that are listed in the
4 heading above have taken charitable deductions for
5 donations of these items to the Foundation?
6 MR. MICKLEWRIGHT: Objection to the form.
7 If you can, answer the question.
8 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:

Page 4

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

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

Page 5

1 Transportation Board by Docket No. AB-33 (Sub-No." -- I
2 think 13230, but I could be wrong about that number --
3 "and includes 21.6 miles of right-of-way and track
4 material. Respectfully submitted this 30th day of March,
5 1999." Signed, Donald H. Shank.
6 Handing you that, do you recognize that as your
7 signature?
8 A I do.
9 Q Have you, in fact, made that contribution to
10 the Foundation?
11 A Not as yet.
12 Q Are you in a position to make that
13 contribution between now and when the first of these
14 payments comes due on September 1st of this year? And when
15 I say "are you," are you right now today in a position to
16 make this \$400,000 contribution to the Foundation in order
17 that it can make its September payment to Union Pacific?
18 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:

Page 8

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

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

Page 9

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

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

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

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

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

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

Page 10

1 MR. MICKLEWRIGHT: I understand you may not

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

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

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

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

17 MR. MICKLEWRIGHT: What does that have to do
18 with zoning? **I'm going to instruct him, at this point in**
19 **time, not to answer any questions with respect to his**
20 **financial condition.** That was based on information

21 provided to the Surface Transportation Board from which
22 your client could have taken an appeal and did not.

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

25 MR. MICKLEWRIGHT: They were, is my

Page 11

1 understanding.

2 MR. ALLEN: But regardless of that --

3 MR. MICKLEWRIGHT: Well, they had a right.

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

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

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

Page 12

1 financial statement was given, which is dated March 15,
2 1999?
3 A Yes, I believe that's correct.
4 **Q Second question, do you presently have**
5 **available cash and cash equivalents in a range of, and**
6 **let's say within that number, plus or minus ten percent, in**
7 **the amount of \$18,700?**
8 **MR. MICKLEWRIGHT: I'll instruct the witness**
9 **not to answer the question.**
10 Q (By Mr. Allen) Under "Notes and Loans
11 Receivable" of the Statement of Financial Condition, it
12 lists a second trust deed receivable of
\$145,000. Was that
13 a substantially accurate statement as of the time it was
14 made in March of 1999?
15 A It was.
16 Q Can you tell us who was the obligor on that
17 trustee?
18 A It's confidential.
19 Q Well, it's subject to a confidentiality
20 agreement, but I still want the answer.
21 A My brother-in-law.
22 MR. MICKLEWRIGHT: Yeah, it's subject to
23 confidentiality.
24 **Q (By Mr. Allen) Has that been paid to you,**
25 **or is it still owed to him by you?**

Page 13

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

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

12 A At the time it was made.

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

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

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

22 A Borrasca.

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

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

Page 14

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

5 A It was.

6 **Q And do you presently have a**
7 **50 percent**
8 **ownership in Borrasca Land and Development?**

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

11 question has nothing to do with zoning, that it is a
12 belated attempt at an attack on the Offer of Financial
13 Assistance and that to do so would be a violation of 28 USC
14 2344.
15 Q (By Mr. Allen) The next line is -- I'm
16 going to back up. Regardless of whether you have any
17 interest in it or not, does Borrasca Land and Development
18 still exist as an entity?
19 A No.
20 Q Next line item shows "The Mortgage Station,
21 LLC, 50 percent, and then in parens, (with wife), close
22 parens, \$40,000. Was that a substantially accurate
23 representation at the time it was made?
24 A Yes.
25 Q Now, as I understand it, at the time of this

Page 15

1 financial statement in March of 1999, you were married?
2 A Correct.
3 Q And you are no longer married?
4 A That's correct.
5 Q Are you still involved in a business called
6 The Mortgage Station, LLC?
7 A No, I am not.
8 Q The next line item is "Air Park Village,
9 LLC," 50 percent ownership. Excuse me. Shows a line item
10 of \$250,000. Was that a substantially accurate
11 representation at the time it was made?
12 A It was.
13 Q And you own -- when this says 250,000, does
14 that mean that the total of Air Park Village, LLC, was 250
15 and your 50 percent was 125, or does that mean the total
16 was 500 and your equitable interest is 250?
17 A The figure represented here is
18 representative of my 50 percent.
19 Q So then presumably the total then for the
20 entire worth of Air Park Village, LLC, would be about
21 \$500,000?
22 A Yes.
23 Q These are all even numbers. I assume there

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

Page 16

1 say?

2 A That is correct.

3 Q Is Air Park Village, LLC, still in
4 existence?

5 A It is.

6 Q Are you still a 50 percent owner?

7 A I am.

8 **Q Will you tell us whether or not 250,000 is a**
9 **fair figure for your approximate ownership today?**

10 **MR. MICKLEWRIGHT: I'll object and instruct**
11 **the witness not to answer the question.**

12 Q (By Mr. Allen) With regard to the final

13 line item here under "Land and Business, 22.66 acres,
14 Highway 160 East," 100 percent owner. I assume that's

15 Highway 160, US Highway 160 in La Plata County, Colorado?

16 A That's correct.

17 **Q Is that figure, 450,000, a substantially**
18 **accurate figure as of the time this representation was**
19 **made?**

20 A It was.

21 Q And are you still the owner of that
22 property?

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

25 Q (By Mr. Allen) Well, is there still

Page 17

1 property at that location having roughly that
2 configuration, 22.66 acres?

3 A There is.

4 Q Where is that located on Highway 160?

5 A That property is located – if you're
6 familiar with Farmington Hill?

7 Q I am.

8 A That's the intersection between 550 and 160.

9 It is approximately half a mile east on the north side of

10 Highway 160.
11 Q Other assets there is shown a figure of
12 \$495,000 for personal residence in Agoura, California, held
13 jointly. It says "held jointly." I assume that was held
14 with your former wife?
15 A Correct.
16 Q Was that a substantially accurate figure at
17 the time it was made?
18 A It was.
19 Q Do you still have any ownership interest in
20 that property?
21 A No, I do not.
22 Q Was your ownership interest – where this
23 says "personal residence, jointly," is 495,000 the net
24 equity held by both you and your wife at that time?
25 A Correct.

Page 18

1 Q Did your divorce take place in California?
2 A Yes.
3 Q And this was, therefore, a California
4 community property, if you know?
5 MR. MICKLEWRIGHT: Objection. Calls for a
6 legal conclusion.
7 MR. ALLEN: He can still answer if he knows.
8 MR. MICKLEWRIGHT: I know. If you know.
9 A I do not.
10 Q (By Mr. Allen) **In the course of becoming**
11 **divorced, did you receive any part of that property or**
12 **payment in return for your share of that property?**
13 **MR. MICKLEWRIGHT: I'll object and instruct**
14 **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 Blackburn¹ 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

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 completed 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.

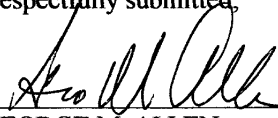
In the course of the litigation, Creede made a federal court record which is beyond dispute that neither Donald Shank nor the Foundation had an intent to operate freight rail service over the Creede Branch. Rather, they intended to use the OFA rights to extract lease rentals and to engage in a fund-raising 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

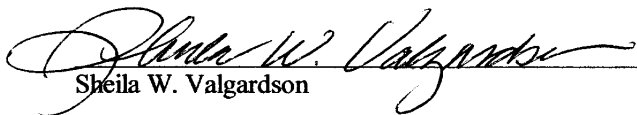
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Sheila W. Valgardson

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BEFORE THE SURFACE TRANSPORTATION BOARD

CITY OF CREEDE, CO,
Petitioner,

DENVER & RIO GRANDE
RAILWAY HISTORICAL
FOUNDATION, INC.,
Respondent

FINANCE DOCKET NO. 34376

PETITION FOR
DECLARATORY ORDER

UNION PACIFIC RAILROAD
COMPANY - ABANDONMENT
EXEMPTION - IN RIO GRANDE
AND MINERAL COUNTIES, CO

DOCKET NO. AB-33
(SUB-NO. 132X)

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TABLE OF CONTENTS
PETITIONER'S SUBMISSION OF MATERIALS
COMPILED DURING U.S. DISTRICT COURT PROCEEDINGS

—— § ——

Date	Document	Page
October 3, 2003	Affidavit of Mayor Betty Jean Myers On Behalf of The City of Creede	1
September 18, 1997	Donation of \$2,500 to Foundation	11
September 22, 1997	Confirmation of Receipt of Caboose By Foundation	12
Undated	Detail of Foundation Expenses	14
March 20, 1998	Foundation Application for Exempt Status IRS Form 1023	17
November 28, 2000	Foundation IRS Form 990 Return	28
June 8, 1998	\$2,500 Donation Agreement to Foundation By Robert DeFreese	39

September 21, 1998	Union Pacific Detail on Bridges on Creede Branch	40
October 12, 1998	\$35.00 Donation To Foundation By Robert Roper	41
April 2, 1999	Petition For Leave To File Offer of Financial Assistance Out Of Time And Tendered Offer of Financial Assistance	42
November 30, 1998	Unaudited Statement of Financial Condition of Foundation	47
April 2, 1999	Donald Shank Personal Guaranty of \$400,000.00 To Foundation Toward Purchase Price To Be Paid To Union Pacific	50
April 2, 1999	Statement of Financial Condition of Donald H. Shank	51
March 15, 1999	Shank Claim of Ownership of \$495,000 House at 6214 Watertree Court, Agoura Hills California and Total Assets Of \$1,957,600.00	52
March 11, 1999	Union Pacific Net Liquidation Value Computation showing NLV of \$69,435.00	54
August 8, 1999	Warrant of State of Colorado to Foundation For \$1,994.00	55
September 19, 2000	Letter from Colorado Attorney General Ken Salazar to Mineral County Commissioners, Mayor of Creede and Foundation	56
October 31, 2000	Letter from Donald Shank to Lindsay Fox Regarding Production of Foundation Tax Return And Threatening Harassment Complaint To IRS	58
November 7, 2000	Complaint, Mineral County District Court	60
February 13, 2001	Answer, Mineral County District Court	65

February 15, 2001	Foundation Letter To Retired Creede Resident Louise Gray Demanding That She Make Lease Payments To Foundation and Provide Foundation With Insurance Cover of \$1 Million, including demand that right of way Be Vacated in 30 days if not leased from Foundation	69
February 15, 2001	Foundation Letter To Creede Residents Mr. and Mrs. Dale Pizel Demanding That They Make Lease Payments To Foundation and Provide Foundation With Insurance Cover of \$1 Million, including demand that right of way Be Vacated in 30 days if not leased from Foundation	86
February 20, 2001	Download and Printout of Foundation Website Including Statements Foundation Will Operate Station in Creede	87
February 21, 2001	Affidavit of Creede Mayor B.J. Myers Filed in State Court in Support of Motion To Take Deposition Of Donald Shank	101
February 22, 2001	Notice of Removal of State Court Action To United States District Court	108
March 8, 2001	Affidavit of Creede Historical Expert Ed Hargraves	113
March 12, 2001	Motion To Remand To State Court	116
April 2, 2001	Reply in Opposition To Motion To Remand, Asserting Appropriate Federal Jurisdiction	138
March 23, 2001	Affidavit of Donald H. Shank contending Foundation Ability to Pay Purchase Price to Union Pacific	153
May 14, 2001	Foundation Property Declaration to State of Colorado	163
May 8, 2001	Order by Chief U.S. District Judge Lewis Babcock denying Motion To Remand To State Court	175
May 16, 2001	Motion To Take Deposition of Donald Shank	182

May 16, 2001	Affidavit of Creede Mayor B.J. Myers	202
June 21, 2001	Transcript of Deposition of Donald Shank	210
June 21, 2001	Testimony By Shank Stating Foundation Has No Identified Demand for Freight Shipment	213-214
June 21, 2001	Testimony By Donald Shank That Cost Of Re-establishment of Service is Approximately \$700,000.00	237
August 3, 2001	Transcript of Second Deposition of Donald Shank	241
August 3, 2001	Testimony by Donald Shank that he is unable to make good his personal \$400,000 guaranty to Foundation for payment of balance of purchase price to Union Pacific (approx. \$275,000)	242
August 3, 2001	Refusal by Shank to Answer Questions Regarding Personal Assets He Claimed on His Financial Statement to STB	244
August 3, 2001	Refusal by Shank to Respond to Question Regarding \$495,000 California House claimed On His Financial Statement To STB	245
August 3, 2001	Testimony by Shank putting Foundation legal Fees for Colorado suit at above \$20,000.00	247
August 3, 2001	Admission by Shank That Foundation Has Not Received Assets Claimed by Foundation on Its Financial Statement to STB, does not have Documents for donation of assets, is not insuring Assets and does not have possession of assets; That assets are still in possession of prospective Donors	253-254
August 3, 2001	Refusal by Shank to testify regarding potential Foundation donors or future finances	258
August 3, 2001	Further Shank testimony of inability to	

	Make \$400,000 payment to Foundation	252
August 3, 2001	Testimony by Shank that South Fork, CO Sawmill (last freight shipper to/from South Fork) Closed in December, 2000	266
September 24, 2001	Transcript of Hearing in U.S. District Court before Magistrate Judge Craig Shaffer	282
September 24, 2001	Stipulation by Shank's Denver counsel That He Does Not Have \$400,000 to Make Good his Personal Guaranty to Foundation	307
September 28, 2001	Transcript of Hearing Before Chief Judge Lewis T. Babcock in U.S. District Court, Denver	313
October 1, 2001	Order by Judge Babcock denying Motion to Stay District Court Discovery	342
March 27, 2002	Plaintiff's Submission for March 27, 2002 Status Conference Consisting of Documents From Shank California Divorce	344
May 10, 2001	Judgment of Divorce, Los Angeles Superior Court	351
October 28, 2000	Stipulated Judgment of Dissolution in Shank Divorce	352
October 28, 2000	Stipulated Judgment Provision That 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. . .”	361
November 11, 2002	Plaintiff’s Motion To File Supplemental Materials In District Court	387
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;	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.”	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.”	406
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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.”	409
September 24, 2002	Email from Donald Shank to Laurie Blanz. Email from Mr.	



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

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.



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

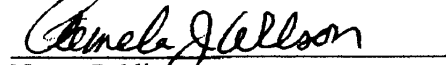


background further established that the California real property claimed by Mr. Shank on his personal financial statement to the STB (with a claimed value to the STB of nearly half a million dollars) was in fact property owned by Mr. Shank's former wife as to which Mr. Shank signed a sworn statement 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

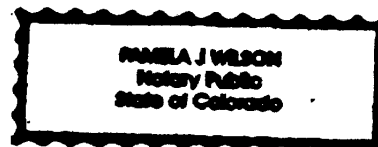


EXHIBIT A**THE FOLLOWING IS A LIST OF BUSINESS WITHIN THE CITY OF CREEDE AND
ALONG THE RIGHT-OF-WAY WITHIN MINERAL COUNTY**

- *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 1/2 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
350 WEST C STREET
SAN DIEGO, CA 92101
90-40501222

4334

4334

PAY ***** TWO THOUSAND FIVE HUNDRED ***** 00/100 Dollars
DATE AMOUNT
OTHER 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⑆ 0322500691⑈

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

11



23

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



72

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



**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) 1474 Main Avenue	Room/Suite 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).		
10 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

Signature

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.

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 example 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 committed 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 | 6. National Historical Society sponsors |
| 2. Charitable donations from the public | 7. Governmental Grants |
| 3. Donations from local businesses | |
| 4. Corporate sponsorship | |
| 5. State Historical Society sponsorship | |

- 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.

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

b Annual compensation

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.

e 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? If either of these questions is answered "Yes," explain.

☐ Yes ☒ No
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 its 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 resurrection 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? ☒ 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

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.

21

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			(e) TOTAL
	(a) From 1-98 to present	(b) 19 97	(c) 19 98* *proposed	(d) 19 99* *proposed	
Revenue					
1 Gifts, grants, and contributions received (not including unusual grants—see pages 5 and 6 of the instructions)	0	0	0	0	
2 Membership fees received	0		\$5,000	\$10,000	
3 Gross investment income (see instructions for definition)	0	0	0	0	
4 Net income from organization's unrelated business activities not included on line 3.	0	0	0	0	
5 Tax revenues levied for and either paid to or spent on behalf of the organization	0	0	0	0	
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).	0	0	0	0	
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	0	0	\$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)	0	0	0	0	
12 Unusual grants	0	\$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	0	0	\$1,500.00	\$4,000.00	
15 Contributions, gifts, grants, and similar amounts paid (attach schedule)	0	0	\$100.00	\$200.00	
16 Disbursements to or for benefit of members (attach schedule)	0	0	0	0	
17 Compensation of officers, directors, and trustees (attach schedule)	0	\$1,200.00	\$5,000.00	\$15,000.00	
18 Other salaries and wages	0	0	\$6,500.00	\$17,500.00	
19 Interest	0	0	0	0	
20 Occupancy (rent, utilities, etc.)	0	\$677.00	\$2,400.00	\$2,400.00	
21 Depreciation and depletion	0	0	0	0	
22 Other (attach schedule)	0	\$163.70	\$10,500	\$20,800	
23 Total expenses (add lines 14 through 22)	0	\$2,040.70	\$26,000.00	\$59,900.00	
24 Excess of revenue over expenses (line 13 minus line 23)	\$1.30	\$467.36	0	\$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	0
3	Inventories	3	0
4	Bonds and notes receivable (attach schedule)	4	0
5	Corporate stocks (attach schedule)	5	0
6	Mortgage loans (attach schedule)	6	0
7	Other investments (attach schedule)	7	0
8	Depreciable and depletable assets (attach schedule)	8	0
9	Land	9	0
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

	Accounts payable Deferred compensation to President/Director	12	\$2,350.00
13	Contributions, gifts, grants, etc., payable	13	0
14	Mortgages and notes payable (attach schedule)	14	0
15	Other liabilities (attach schedule)	15	0
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

- 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. For more information, see Rev. Proc. 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 HISTORICAL FOUNDATION 1005
102 1/2 W. 16TH ST.
DURANGO, CO 81301
970-254-3408

DATE **MAR 20 1998**

THE IRS OF **INTERNAL REVENUE SERVICE** \$ **465.00**
FOUR HUNDRED SIXTY-FIVE & 00/100 DOLLARS

USER FEE FOR EXEMPT ORGANIZATION
#001005# 1020000761 6498008786

Donald H. Shank
Gauge Shank

Form **872-C**

(Rev. April 1996)

Department of the Treasury
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. 1545-0058

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)

Name of organization (as shown in organizing document)

Denver & Rio Grande Railway Historical Foundation

Date

March 20, 1998Officer or trustee having authority to sign Donald H. Shank, President/Chairman

Signature

or IRS use only

Title President

Director or Assistant Commissioner (Employee Plans and Exempt Organizations)

Date



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

OMB No. 1545-0047

1999

This Form is
Open to Public
Inspection

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

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)

C Name of organization
 Please use IRS label or print or type. See Specific Instructions.
DENVER & RIOGRANDE RAILWAY HISTORICAL FOUNDATION
 Number and street (or P.O. box if mail is not delivered to street address) Room/suite
1474 MAIN AVE, 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
I If either box in H is checked "Yes," enter four-digit group exemption number (GEN) **79**

(b) If "Yes," enter the number of affiliates for which this return is filed: **79**

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

J Accounting method: ☒ Cash ☐ Accrual
☐ Other (specify) **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		
Revenue	8a	Gross amount from sales of assets other than inventory	(A) Securities	(B) Other
	b	Less: cost or other basis and sales expenses	8a	
	c	Gain or (loss) (attach schedule)	8b	
	d	Net gain or (loss) (combine line 8c, columns (A) and (B))	8c	
	9	Special events and activities (attach schedule)	8d	
	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 13 and 14, 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)	22			
	(cash \$ _____ noncash \$ _____)				
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 \$ _____)
e	Other program services (attach schedule) (Grants and allocations \$ _____)
f	Total of Program Service Expenses (should equal line 44, column (B), Program services) ▶ 10,366

29

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
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	48c 150,000
b	Less: allowance for doubtful accounts	48b	
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
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
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 415,798
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): _____ _____ \$ _____	b
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): _____ _____ \$ _____	d
Add amounts on lines (1) and (2) ▶	d
e Total revenue per line 12, Form 990 (line c plus line d) . . . ▶	e 415,798

Reconciliation of Expenses per Audited Financial Statements with Expenses per Return

a	Total expenses and losses per audited financial statements	▶	a	27,000
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	27,000

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

[illegible]

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 1a

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

Other Information (See Specific Instructions on page 25.)

	Yes	No
76 Did the organization engage in any activity not previously reported to the IRS? If "Yes," attach a detailed description of each activity.	76	X
77 Were any changes made in the organizing or governing documents but not reported to the IRS? If "Yes," attach a conformed copy of the changes.	77	X
78a Did the organization have unrelated business gross income of \$1,000 or more during the year covered by this return?	78a	X
b If "Yes," has it filed a tax return on Form 990-T for this year?	78b	X
79 Was there a liquidation, dissolution, termination, or substantial contraction during the year? If "Yes," attach a statement.	79	X
80a Is the organization related (other than by association with a statewide or nationwide organization) through common membership, governing bodies, trustees, officers, etc., to any other exempt or nonexempt organization?	80a	X
b If "Yes," enter the name of the organization _____ and check whether it is ☐ exempt OR ☐ nonexempt.		
81a Enter the amount of political expenditures, direct or indirect, as described in the instructions for line 81.	81a	
b Did the organization file Form 1120-POL for this year?	81b	X
82a Did the organization receive donated services or the use of materials, equipment, or facilities at no charge or at substantially less than fair rental value?	82a	X
b If "Yes," you may indicate the value of these items here. Do not include this amount as revenue in Part I or as an expense in Part II. (See instructions for reporting in Part III.)	82b	
83a Did the organization comply with the public inspection requirements for returns and exemption applications?	83a	X
b Did the organization comply with the disclosure requirements relating to quid pro quo contributions?	83b	X
84a Did the organization solicit any contributions or gifts that were not tax deductible?	84a	X
b If "Yes," did the organization include with every solicitation an express statement that such contributions or gifts were not tax deductible?	84b	
85 501(c)(4), (5), or (6) organizations. a Were substantially all dues nondeductible by members?	85a	
b Did the organization make only in-house lobbying expenditures of \$2,000 or less? If "Yes" was answered to either 85a or 85b, do not complete 85c through 85h below unless the organization received a waiver for proxy tax owed for the prior year.	85b	
c Dues, assessments, and similar amounts from members	85c	
d Section 162(e) lobbying and political expenditures	85d	
e Aggregate nondeductible amount of section 6033(e)(1)(A) dues notices	85e	
f Taxable amount of lobbying and political expenditures (line 85d less 85e)	85f	
g Does the organization elect to pay the section 6033(e) tax on the amount in 85f?	85g	
h If section 6033(e)(1)(A) dues notices were sent, does the organization agree to add the amount in 85f to its reasonable estimate of dues allocable to nondeductible lobbying and political expenditures for the following tax year?	85h	X
86 501(c)(7) orgs. Enter: a Initiation fees and capital contributions included on line 12	86a	
b Gross receipts, included on line 12, for public use of club facilities.	86b	
87 501(c)(12) orgs. Enter: a Gross income from members or shareholders.	87a	
b Gross income from other sources. (Do not net amounts due or paid to other sources against amounts due or received from them.)	87b	
88 At any time during the year, did the organization own a 50% or greater interest in a taxable corporation or partnership, or an entity disregarded as separate from the organization under Regulations sections 301.7701-2 and 301.7701-3? If "Yes," complete Part IX	88	X
89a 501(c)(3) organizations. Enter: Amount of tax imposed on the organization during the year under: section 4911 $\oplus$; section 4912 $\oplus$; section 4955 $\oplus$		
b 501(c)(3) and 501(c)(4) orgs. Did the organization engage in any section 4958 excess benefit transaction during the year or did it become aware of an excess benefit transaction from a prior year? If "Yes," attach a statement explaining each transaction.	89b	X
c Enter: Amount of tax imposed on the organization managers or disqualified persons during the year under sections 4912, 4955, and 4958.	-0-	
d Enter: Amount of tax on line 89c, above, reimbursed by the organization.	-0-	
90a List the states with which a copy of this return is filed	COLORADO	
b Number of employees employed in the pay period that includes March 12, 1999 (See inst.)	90b	-0-
91 The books are in care of DONALD SHANK Telephone no. (970) 247-9498 Located at 1474 MAIN AVE, SUITE DURANGO, CO ZIP + 4 81301		
92 Section 4947(a)(1) nonexempt charitable trusts filing Form 990 in lieu of Form 1041—Check here and enter the amount of tax-exempt interest received or accrued during the tax year	92	

Form 4562

Depreciation and Amortization
(Including Information on Listed Property)

OMB No. 1545-0172

Department of the Treasury
Internal Revenue Service (99)

j See separate instructions.

j Attach this form to your return.

1999

Attachment
Sequence No. 67

Name(s) shown on return

Business or activity to which this form relates

Identifying number
84-1433080

DENVER & RIO GRANDE RAILWAY HIST. FOUND.

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

For Paperwork Reduction Act Notice, see the separate instructions.

EEA

Form 4562 (1999)

Depreciation Detail Listing

1999

For your records only

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' X 16' TRKS	4/27/99	3000				3000	7	MACRS	14.29	429						
3	MISC RE ITEMS	8/19/99	200				200	7	MACRS	14.29	29						
1a	1880 CABOOSE #518	8/19/99	700				700	7	MACRS	14.29	100						
2a	1890 DINING CAR STANDARD GAUGE		2500				2500	7	MACRS	14.29	357						
1b	CRESCENT BRANCH	8/19/99	624,616				624,616	-	-	-							
1c	LAND-SILVERTON 7.369 ACRES	1/3/99	34,000				34,000	-	-	-							
							665,416				472						

SCHEDULE A
(Form 990)

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

OMB No. 1545-0047

1999

Department of the Treasury
Internal Revenue Service

Supplementary Information—(See separate instructions.)

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

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)(vii). (Also complete the **Support Schedule** in Part IV-A.)
- 12 ☒ An organization that normally receives: (1) more than 33 1/3% 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 33 1/3% 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 33

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.)



26

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 24 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

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 crossed
✓317.46	180' TST-OD	1900 12 sp
✓319.97	45' TST-OD	1900 3 span

27 ft high 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.

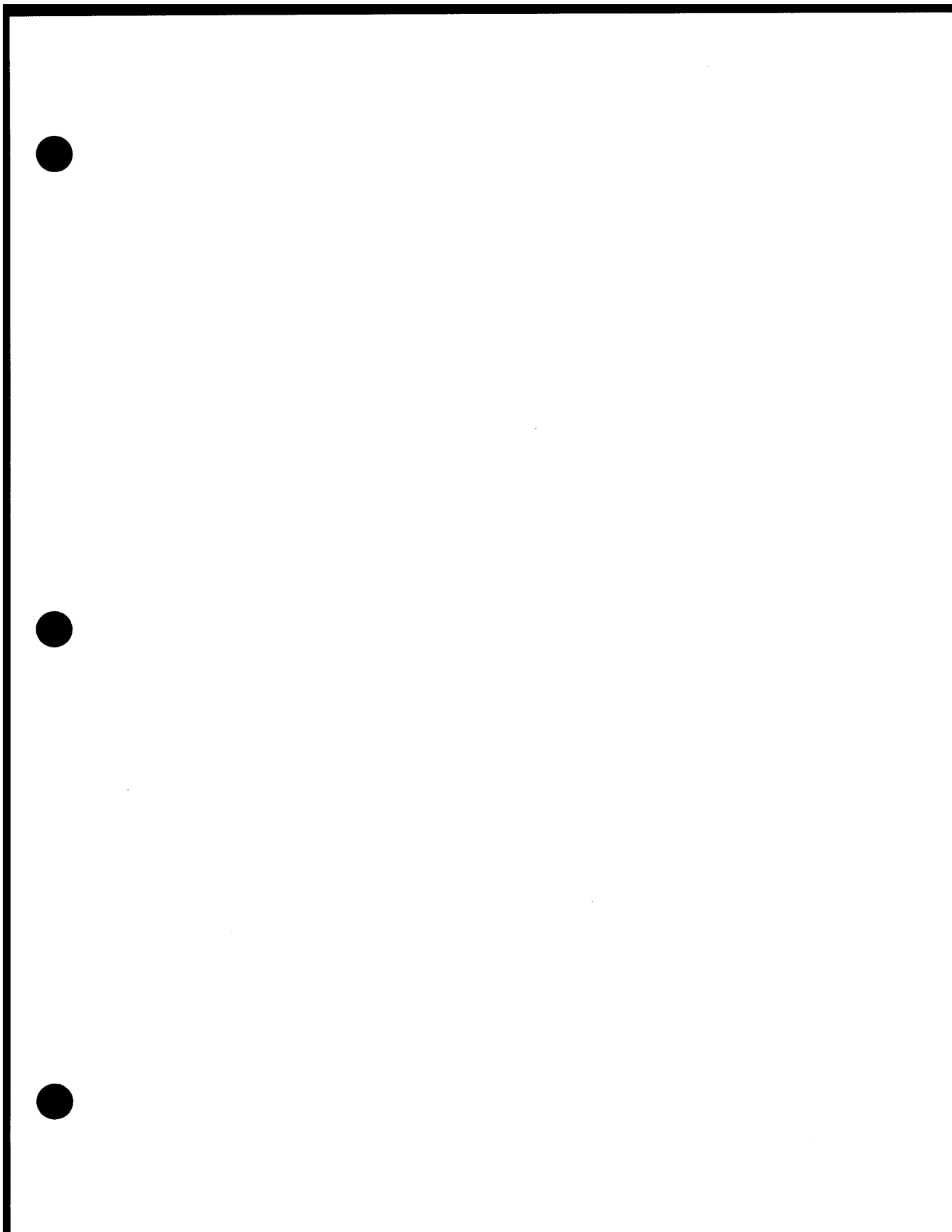
I would like to note that all future correspondence and the membership card be made to D&RG-ROPER as shown on the enclosed card.

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



(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

86



BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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:

<u>Segment No.</u>	<u>Acres in Fee</u>	<u>Value Per Acre</u>	<u>Total Segment Value</u>
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

46

-4-

**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)

47

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		<u>608.75</u>
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	<u>10,000.00</u>
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.	<u>21,500.00</u>
Total Railroad Memorabilia & Artifacts	65,000.00

MODEL RAILROAD COLLECTIONS

Lionel Train Collection	55,000.00
American Flyer Collection	35,000.00
Sz3, N scale, and misc.	<u>62,000.00</u>
Total Model Railroad Collections	152,000.00

OTHER ASSETS

Land - 7.375 acres Silverton, CO - Donated for Cash Conversion	<u>35,000.00</u>
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	
Annualised Office Lease - Durango @ \$325.00/month	<u>3,900.00</u>
Total Accounts and Contract Payable	<u>3,900.00</u>

TOTAL LIABILITIES	3,900.00
--------------------------	-----------------

NET WORTH	319,794.07
------------------	-------------------

TOTAL LIABILITIES AND NET WORTH	323,694.07
--	-------------------

Donald H. Shank

1476 Main Avenue, Suite 121, Durango, CO 81301 Tel. 970.259.9498 Fax: 259.0085

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 Natl Bank of Durango - Ctg #408921	8,000
U.S. Savings Bonds	1,500
Total Cash and Cash Equivalents	18,700

NOTES AND LOANS RECEIVABLE

Second Trust Deed Receivable	143,000
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
Nordylke 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, 5214 Watertree Ct. Agoura, CA (jointly)	495,000
Autos, 95 Ford Explorer	18,000
Personal Furnishings, Rare Art, Ancient and Modern Coins	215,000
Total Other Assets	728,000

TOTAL ASSETS**\$1,957,600**

DONALD H. SHANK**STATEMENT OF FINANCIAL CONDITION**

(Unaudited)

MARCH 15, 1999**LIABILITIES AND NET WORTH****LIABILITIES**

Accounts and Credit Cards Payable 21,300

Contracts Payable

Lease Durango Residence, Mthly Pymt @ \$1,500 9,000

G.E.C.A.L. Auto Lease Pymt @ \$77/mo 1,131Total Contracts and Accts. Payable 31,431**Trust Deeds and Notes Payable**First Trust Deed to Banc Boston secured by
personal residence, payable in monthly
installments of \$1,288 PTTI @ 7.75% 15 yr amort
maturing in February 2007 62,000First Trust Deed to Charles Shafer II secured
by 22.66 acres Hwy 160 prin and int due
Nov. 13, 1999 93,000Second Trust Deed to Lauer/McAtee secured by
22.66 acres Hwy 160 prin and int due Nov 13, 1999 180,000Total Trust Deed and Notes Payable 335,000**TOTAL LIABILITIES** (365,431)**TOTAL ASSETS** 1,957,600**NET WORTH** \$1,591,169



1-29

LAW DEPT.

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

MAR 11 1999

REC'D URBRE-99

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		OTM	SWITCHES			Net Tons	NET TONS		
	Track Miles	Net Tons	Net Tons	No. 7	No. 8.5 & No. 9	No. 10				
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				CURRENT MARKET VALUE		BASE YEAR VALUE	
SWITCH TIES	477	EA					
CROSS TIES	62521	EA					
TOTAL TIES	62998	EA					

VALUE OF TRACK COMPONENTS

							DRI RATE	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



NET 1,99400
NONI NEGOTIABILI E





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.

56

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.

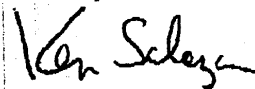
4. To the extent that Mr. Shank would attempt to collect remuneration from any user of property within the right-of-way, he is acting outside of any legal authority that we are able to identify.

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

cc: Greg Walcher
Charles Bedford
Patrick Wilson
Merle Knous



11

29

DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION

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

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

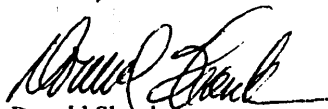
Lindsay Fox
October 31, 2000
Page 2

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,

-vs-

*Margaret A. Wardell
Clerk of the Combined Court*

**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.

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

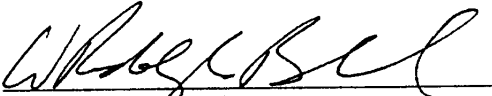
WHEREFORE, Plaintiff prays that this Court enter judgment as set forth in paragraph 12 above, together with such other and further relief as the Court deems appropriate, including Plaintiff's cost of this action.

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.

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.

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

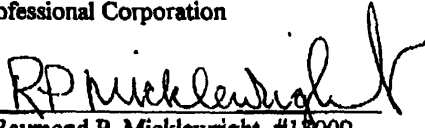
A. Local zoning and land use laws cannot be lawfully applied in a manner that would result in a diminution of the width of Defendants' railroad right-of-way inasmuch as the full width of railroad right-of-way is presumed to be necessary for the legitimate purposes of the railroad.

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


Raymond P. Micklewright, #18009
Attorneys for Defendants
44 Cook Street, Suite 1000
Denver, CO 80206-5827
(303) 329-6826

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

Jane E. Newell



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

69

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.

Document 0101

Page 1 of 12

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 execution 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.

Document 0101

Page 2 of 12

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

Document 0101

Page 4 of 12

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,

Document 0101

Page 5 of 12

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 commence.

Document 0101

Page 6 of 12

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.

Document 0101

Page 7 of 12

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 by 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.

Document 0101
Page 8 of 12

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 by 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.

Document 0101
Page 9 of 12

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 by 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 be made by Lessee hereunder within three (3) days after written notice be Lessor or fails to

Document 0101

Page 10 of 12

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

Document 0101
Page 11 of 12

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.

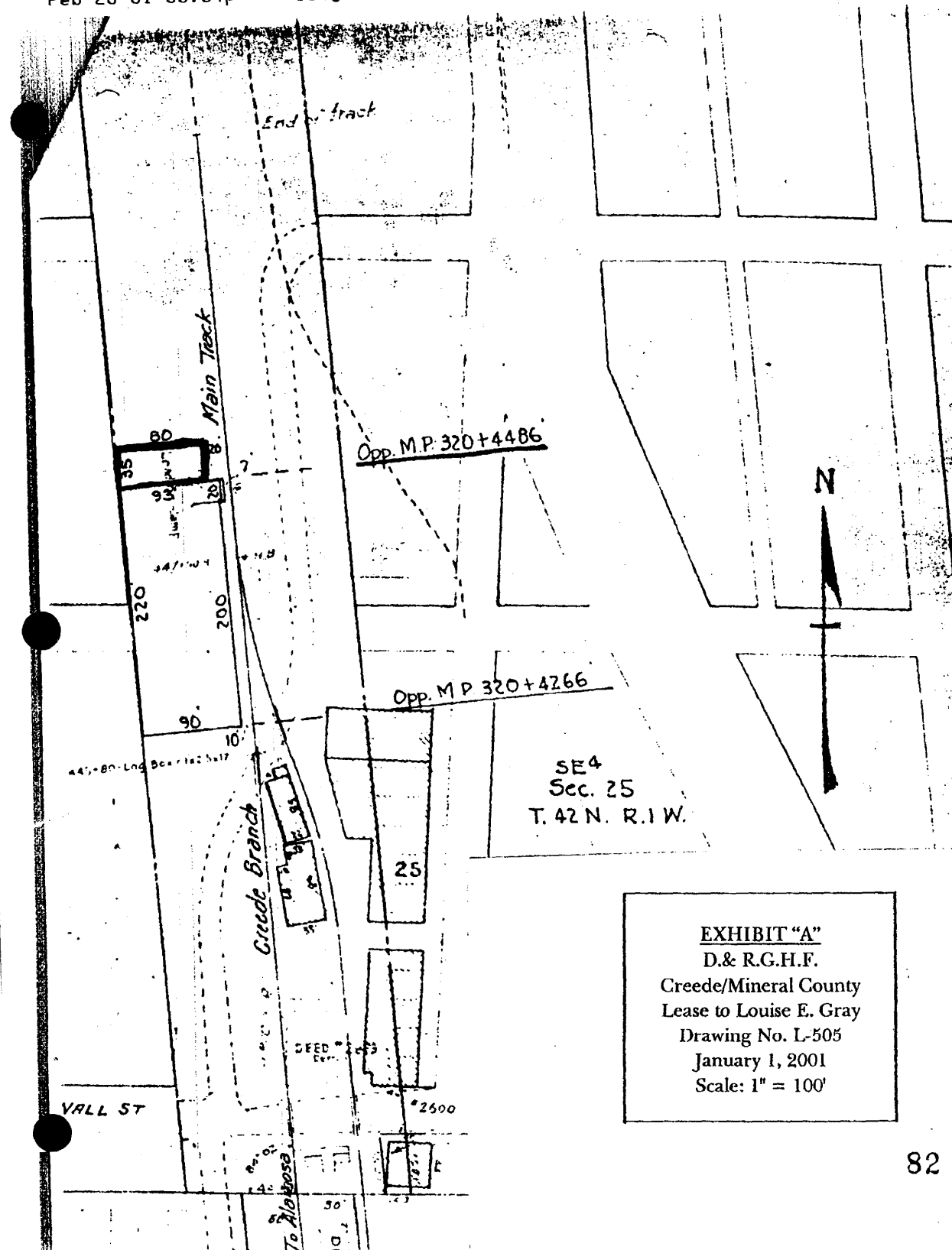


EXHIBIT BGENERAL INSURANCE REQUIREMENTS ("GIR")

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 Permitter 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.

EXHIBIT "B"
Page 1 of 2

- 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.

EXHIBIT "B"

Page 2 of 2

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.

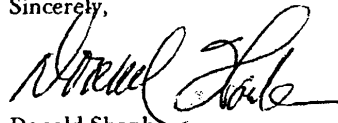
Therefore, accompanying this letter please find your new Lease, in duplicate copies. The rental amount has increased modestly in comparison to the dramatic increase in property values.

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

85

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IF YOU'RE NOT RECYCLING



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

87

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 Found

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

88

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@colorado.net****Denver & Rio Grande Railway Historical Foundation****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 name)

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 Greatest Historic Railroads. The I.D. number will be placed on a Tie Certificate. Once installed, mark the exact location so you can stand on "your" piece of history.**Number of tie(s) ordered: _____ Or circle the appropriate number****89**

	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, 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 one name, A Memorial Plaque, A Dedication Ceremony, Plus some very unique		

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 the (s))-

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

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

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

90

Denver & Rio Grande Railway Historical Foundation**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 interested in a 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 AMERICAN 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](mailto:drghf@durango-rail.com)**

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

91

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 let me know. 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 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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IF YOU'RE NOT RECYCLING



Wagon Wheel Gap Route

of the

Denver & Rio Grande Railway



93

ArchiveLinks

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.

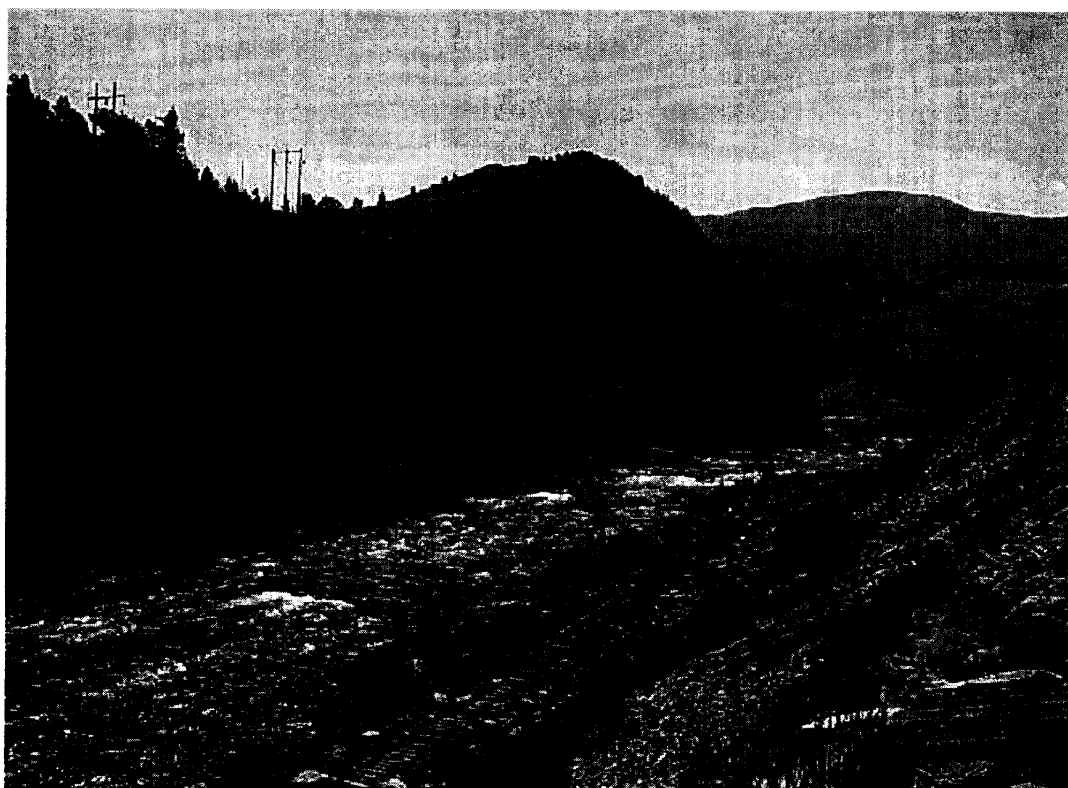
The Line is now being cleaned of brush and small trees, rocks removed and ties replaced where needed. Being a volunteer group spectacular progress has been made. With 10 days of clean up 19.5 miles has been opened with hand tools, a bob-cat tractor and a Fairmont Speeder. Last few places will need tractor 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.

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



alta vista: Get a Free Home Page! Find This: Search



IF YOU'RE NOT RECYCLING



Wagon Wheel Gap Route

of the

Denver & Rio Grande Railway

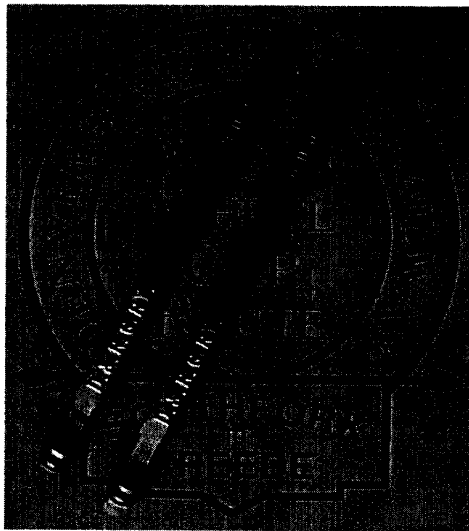


Become part of re-building of one of America's Greatest Railroads by purchasing one or more of these item's below. By

96

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



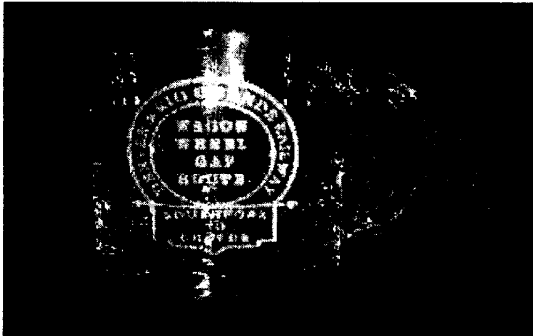
***D&RG RY CAR SEAL'S-**

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**

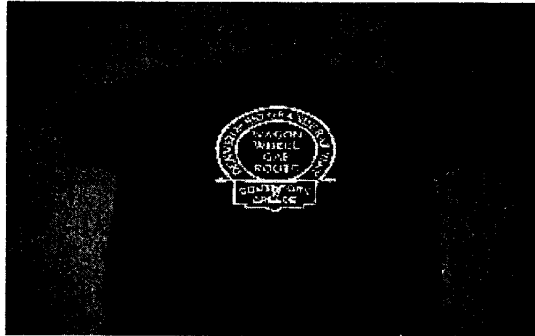
***D&RG RY WAGON WHEEL GAP ROUTE COFFEE MUG-**



Wake-up in the morning to the Wagon Wheel Gap Route Emblem shining 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 peel the bottom layer back, adhere to object, peel 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

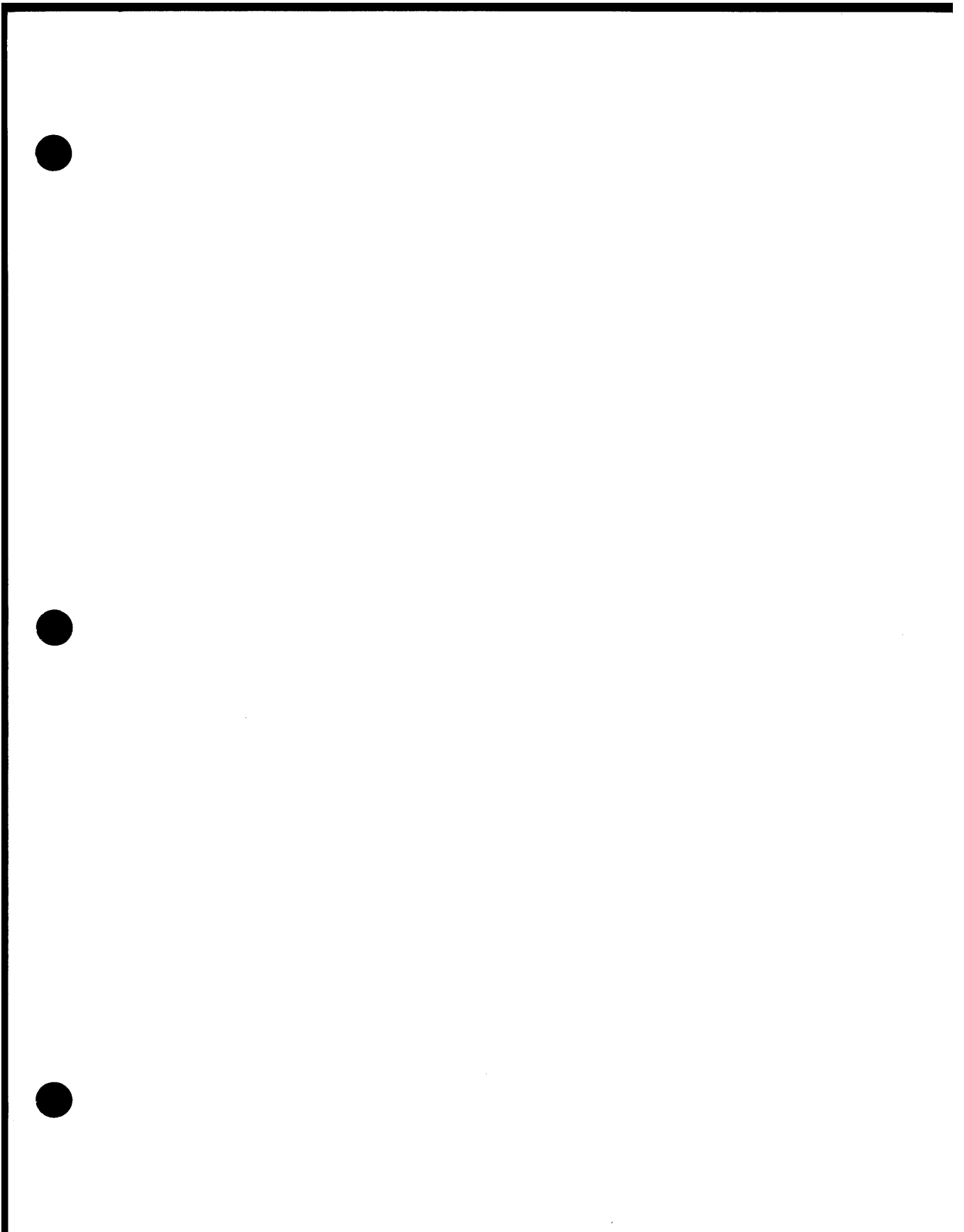
99

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

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



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.

Attorneys for Plaintiff:

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206-A Society Drive

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Facsimile: 970-369-1009

Email: alnoma@yahoo.com

Attorney Registration No. 2080

W. Randolph Barnhart

HILLYARD & BARNHART

7887 East Belleview Ave., Ste. 1200

Englewood CO 80111

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Facsimile: 303-793-1950

Email: rbarnhart@hblegal.com

Attorney Registration No. 5186

▲ COURT USE ONLY ▲

Case Number 00-CV-4

Div. _____ Ctrm. _____

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

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.

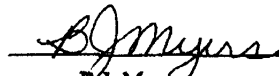
6. One Creede citizen, Louise Gray, was told she must lease the land on which her garage is situated, and was told she must pay Mr. Shank and his Foundation \$300.00 per year for land she has owned and occupied for many years. I know Louise Gray. She is elderly and retired from her job at the hardware 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.

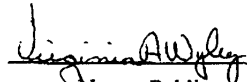
- D. No shipper exists within Creede to ship by rail in interstate commerce.
 - E. No shipper exists beyond Creede to ship by rail to Creede in interstate commerce.
 - F. The D&RGW right of way has not been used for many years and is in fact abandoned.
 - G. The only apparent activities being carried 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 its 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

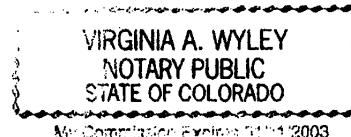
13. Not one visible thing has been done by Mr. Shank or his Foundation to actually provide interstate freight rail service to or from Creede. Not one website page, not one published tariff, not one advertisement for business from shippers, not one purchase of freight rail equipment, not one bridge or 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.

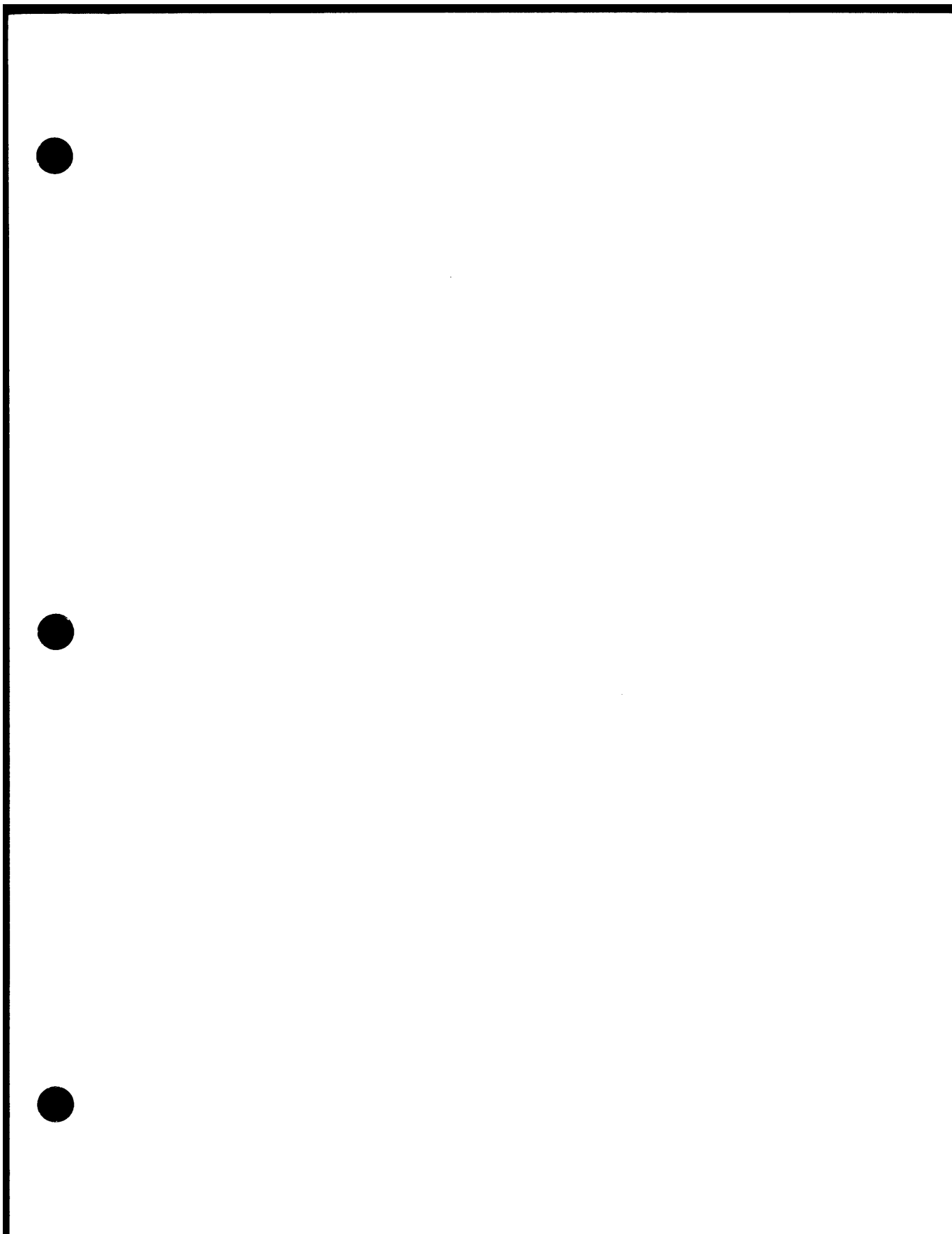

B.J. Myers

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


Notary Public



c:\creede\026.aff



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

CIVIL ACTION NO.

01-

JAMES R. HANSPEAKER
CLERK

-0318

BY _____ DEP. CLK

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.

108

2. Service of summons and complaint was made on Defendants on January 25, 2001 by serving Defendant Mr. Shank as President of Defendant Foundation. This Notice is filed within 30 days after such service, as required by 28 U.S.C. § 1446(b).

3. Attached to this Notice as Appendix 1 is a copy of the Summons and Complaint filed in the State Court action identified above. Attached to this Notice as Appendix 2 is a copy of the Answer filed in that State Court action and subsequent motions filed by Plaintiff City of Creede. The foregoing constitutes all of the process and pleadings filed in that State Court action.

4. The State Court action is a civil action for which this Court has original jurisdiction under 28 U.S.C. § 1331, inasmuch as it arises under the Constitution and laws of the United States. The State Court action seeks a declaratory judgment that residential zoning under the City of Creede's municipal land use law applies to land that a Federal regulatory agency, the Surface Transportation Board, acting pursuant to 49 U.S.C. § 10904, has authorized Defendant Foundation to use to provide rail transportation of freight in interstate commerce and rail transportation of passengers.¹ A United States District Court has original jurisdiction to issue a declaratory judgment determining whether municipal zoning and land use laws, as applied to land used by a federally-authorized interstate rail carrier, would violate the Commerce Clause of the United States Constitution. *Norfolk Southern Railway Company v. City of Austell, Georgia*, 1997 U.S. Dist. LEXIS 17236, at 6-7, N.D., Ga., Atlanta Div., CA No. 1:97-cv-1018-RLV, decision filed August 19, 1997; accord: *Midland Valley R. Co. v. Sutter*, 28 F.2d 163, 167 (8th Cir.

¹ Defendant Foundation was authorized by the STB to acquire and operate a rail line between Derrick and Creede, Colorado, of which the right-of-way land at issue in Creede is a part, in STB Docket No. AB-33 (Sub-No. 132X), *Union Pacific Railroad Company – Abandonment Exemption – in Rio Grande and Mineral Counties, CO*, decision issued May 11, 1999 (not printed), copy attached to this Notice as Appendix 3.

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).²⁷ 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

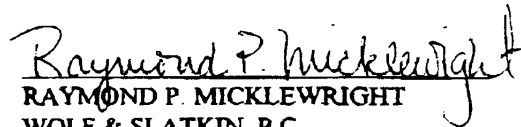
land. See STB Finance Docket No. 33466, *Borough of Riverdale -- Petition for Declaratory Order -- The New York, Susquehanna and Western Railway Corporation*, decision issued Sept. 10, 1999 (not printed), copy attached to this Notice as Appendix 4. The municipality in that case brought the matter to 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

²⁷ 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").

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

Attorney for Defendants

DISTRICT COURT COUNTY OF MINERAL, COLORADO 201 No. Main Street Creede, CO 81130		▲ COURT USE ONLY ▲ Case No. 00-CV-4 Division/Courtroom:
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		
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

)

COUNTY OF MINERAL

)

ss.

)

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 many 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 Hargrave

Subscribed and sworn to before me this 8th day of March, 2001.

Virginia A. Wyley
Notary Public

My commission expires: 1/1/03

VIRGINIA A. WYLEY
NOTARY PUBLIC
STATE OF COLORADO

My Commission Expires 1/1/2003



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 enforceability 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

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).*

action to this Court.²

This action should be remanded for two reasons:

- A. The Complaint does not raise a federal question within the meaning of 28 U.S.C. §1331. The issue of enforcement of local zoning as to *non-rail-related* parts of the right of way is a state law question of purely local concern and could not have been initiated in this federal court.
- B. Even if there is an arguable basis for bare federal jurisdiction, this Court should abstain from exercise of that jurisdiction and remand this case so the state court can determine whether the local zoning regime is applicable to the non-rail-related sector of the right of way implicated by this case.

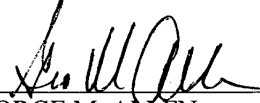
WHEREFORE, we respectfully move that this action be remanded to the District Court for

² The Defendants were notified of this action immediately upon its filing and Mr. Shank had already transmitted a copy of the Complaint to Union Pacific's legal department by November 30, 2000 (Allen February 19, 2001 letter to Micklewright, attached to state court Motion to Take Shank Deposition). The Defendants were in a position to attempt to remove this case (i.e., had notice of its filing and a copy of the Complaint) from about November 10, 2000 onward. The Defendants' Answer was sent to the state court on February 13, 2001. On Wednesday, February 21, 2001, we filed a motion with the state court to take Mr. Shank's deposition. At about 8:30 a.m. the next morning, Thursday, February 22, 2001, this writer notified Denver counsel for Mr. Shank that the state court would hold a conference call hearing on the motion to take Mr. Shank's deposition on the afternoon of Friday, February 23, 2001. At 3:32 p.m. on Thursday afternoon, February 22, 2001, Mr. Shank's Denver counsel filed a Notice of Removal in this Court, effectively preventing the state court from ruling on the motion to take the Shank deposition. In their removal notice the Defendants declare their intention to ask this Court to refer this matter to the Surface Transportation Board, which has no procedure for discovery. It is transparent that the Defendants do not want Mr. Shank to give testimony under oath about the matters for which his deposition was noticed. Those matters include the fact the Foundation is in default on its payments to the Union Pacific railroad for purchase of the right of way.

Mineral County, Colorado.

We further move that this Court award Plaintiff its costs, including attorney fees, associated with obtaining remand.

Respectfully submitted,



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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

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 Borough Of Riverdale Case Recognizes That The Contours Of Preemption Do Not Extend To Non-Railroad-Related Land Uses.*

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

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.

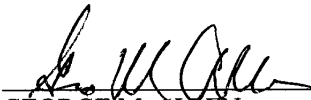
The Anti-Injunction Act exists to protect state jurisdiction and to prevent exactly what has happened here: a removal made for purposes of expediency to avoid a state court order that a deposition be given.

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
- ☒ 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).¹¹ ✓

¹¹ 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

^{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

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 unchallenged 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 as to 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

⁴(...continued)

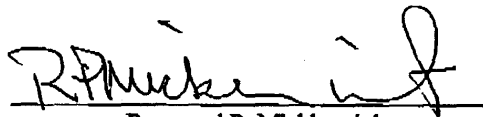
Court and, contrary to the City's allegation at page 3 of the Motion to Remand, note 2, discovery also is available at the STB if this Court were to see fit later on motion to refer issues to the STB under primary jurisdiction. (See 49 C.F.R. § 1114.21, *et seq.*).

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

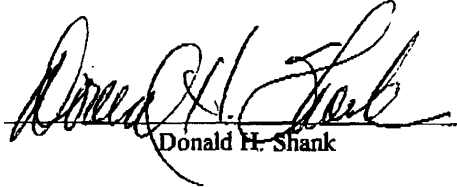
1. My name is Donald H. Shank. I am President of Denver & Rio Grande Railway Historical Foundation ("the Foundation"). The Foundation and I are Defendants in the case before this Court. I have read the Motion to Remand and supporting materials filed by the City of Creede in this case. I have personal 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.

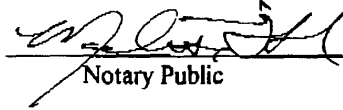
5. The City has previously contended before the STB that the Creede Branch is abandoned. The STB rejected that contention in a decision issued May 24, 2000, a copy of which is attached to this Affidavit as Appendix 2.

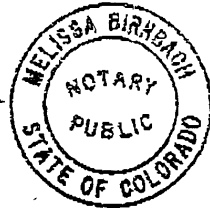

Donald H. Shank

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



Law Department

UNION PACIFIC RAILROAD COMPANY

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

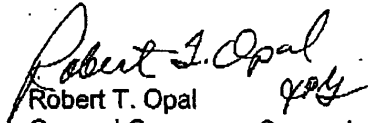
Dear Mr. Williams:

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
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]
259

Q:\LAWADMARTON\WILLIASL.WPD

30766
EB

SERVICE DATE - MAY 24, 2000

RECEIVED

MAY 30 2000

SURFACE TRANSPORTATION BOARD

MCFARLAND & HERMAN

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).

STB Docket No. AB-33 (Sub-No. 132X)

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...)

STB Docket No. AB-33 (Sub-No. 132X)

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" legislation⁷ 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.

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.

STB Docket No. AB-33 (Sub-No. 132X)

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.

STB Docket No. AB-33 (Sub-No. 132X)

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. 10904.⁵

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.

⁵ 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.

STB Docket No. AB-33 (Sub-No. 132X)

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

Type of State Assessed Company: RR

DENVER & RIO GRANDE RAILWAY HISTORICAL
Company Name: FOUNDATION

Railroad Company

FEIN or Social Security Number:

84-1433680

Contact / Dept. : DRG RAILWAY HISTORICAL FOUNDATION RR661
(fi 1474 MAIN AVENUE
Street Address : SUITE 223
Unit / Suite # : DURANGO, CO 81301
City, State, Zip :

Colorado Registered Agent

State of Incorporation: COLORADO

Name: DONALD SHANK
(first) (last)

Year Colorado Operations Began: NOT OPERATING

Company Contact for this report:

Tax agent contact for this report: (Note 1)

Name: DONALD SHANK
(first) (last)

Name: Denise JACKSON
(first) (last)

Title: PRESIDENT & EXEC. DIR.

Title: Bookkeeping / Tax preparer

Phone: 970.259.9498

Phone: (970)247-3240

Fax: 970.259.0202

Fax: (970)247-3240

Email: drghf@frontier.net

Email: dj@frontier.net

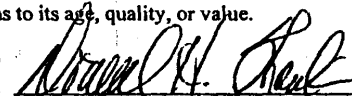
DECLARATION

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 reasonably 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)

(Name)

(Title)


DONALD H. SHANK
PRESIDENT & EXEC. DIR.

(Date) MAY 14, 2001

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.

163

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.

D & R RAILWAY HISTORICAL FOUNDATION
(Reporting Company Name)

INCOME STATEMENT

ACCOUNT TITLE	Reporting Company System				
	Parent Company 2000	2000	1999	1998	1997
1 Railway operating revenues	0	0	0		
2 Railway operating expenses	0	0	0		
3 NET REVENUE FROM RAILWAY OPER.	0	0	0		
4 Income taxes on operating income	0	0	0		
5 Income from leased road and equipment	0	0	0		
6 Rent paid for leased road and equipment	0	0	0		
7 Net Operating Income (line 3 - line 4)	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)	0	N/A	N/A	N/A	N/A	N/A

BALANCE SHEET

ASSETS

	Parent Company	Reporting Company System	Reporting Company Colorado
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)		
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.

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% 5-2-02				
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.

[illegible]

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

Exchange _____ Symbol _____

N/A

✓/A

[illegible]

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	
8. 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.

Denver & Rio Grande Railway
 (Reporting Company Name) *Historical Foundation*

APPORTIONMENT TO COLORADO COUNTIES

Colorado Main Track Mileage				Percent of Total	Colorado Main Track Mileage				of Total of Total
County	Owned	Operated	Total		County	Owned	Operated	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		82.0%
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%
Denver				0.0%	Phillips				0.0%
Dolores				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		100.0%
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%

Allocation of railroad property to Colorado

Total system track miles owned and operated

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.

170

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 calendar 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)	(B)	(B/A)
		TOTAL NET BOOK VALUE OF OPERATING PROPERTY IN THE COUNTY AS OF 1/1/00	NEW or DESTROYED PROPERTY NET BOOK VALUE	PERCENT CHANGE
NEW REAL PROPERTY				
Railway	Mineral & Rio Grande	624,616		
NEW PERSONAL PROPERTY				
1880 CABOSE # 0518	LA Plata	700		
1890 DINING CAR #	Rio Grande	2,500		
MISC Railway Sickles	Rio Grande	3,600		
DESTROYED REAL PROPERTY				
DESTROYED PERSONAL PROPERTY				

Attach additional sheets as necessary.

(Use a Separate Sheet for Each County)

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.

[illegible][illegible]

Attach additional sheets as necessary.

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

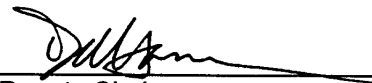
The undersigned certifies that a copy of the foregoing Order was
served on May 8, 2001, by:
() delivery to:

(X) depositing the same in the United States Mail, postage prepaid, addressed
to:

W. Randolph Barnhart, Esq.
Hillyard & Barnhart, L.L.P.
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Englewood, CO 80111

George M. Allen, Esq.
P.O. Box 66; 145 Payson Street
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Wolf & Slatkin, P.C.
44 Cook Street, Suite 1000
Denver, CO 80206-5827


Deputy Clerk



lwa 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

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.*

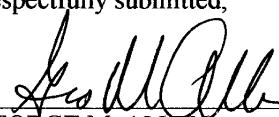
that there is no competence or plan by the defendants for carriage of interstate freight shipments over the rail line at issue and the evidence further establishes that there is no prospective shipper to support interstate freight rail service.

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,



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Telluride CO 81435

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Facsimile: 970-369-1009

Email: alnoma@yahoo.com

Counsel for Plaintiff

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

c:\creede\064.ntc

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

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.

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 regarding 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

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 30(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).⁽¹⁾ 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 can 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 case⁵ and by the District Court for the Southern District of Florida in the *West Palm Beach* case⁶, 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

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*).

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, 2001⁸. 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

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 and others like it will not begin to yield enough money to make up the millions of 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

May 16 01 03:21p

City of Creede

719-658-2017

P.7

05/15/01 TUE 03:15 FAX 402 933 4856

ALLEN -- OMAHA

0008

Jacobs & Russell, LLC

(719) 587-9106

P.4

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

206

May 16 01 03:21p

City of Creede

719-658-2017

P. 8

05/15/01 TUE 03:16 FAX 402 933 4856

ALLEN -- OMAHA

0007

Jacobs & Russell, LLC

(719) 587-9106

P. 3

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

Margaret J. Russell
Margaret J. Russell, Esq.

MJR/pv
cc: Client

FILE

207

May 16 01 03:21p

City of Creede

719-658-2017

P.9

05/15/01 TUE 03:18 FAX 402 933 4858

ALLEN -- OMAHA

0008

Jacobs & Russell, LLC

(719) 587-9106

P.2

LAW OFFICES
McFARLAND & HERMAN
20 NORTH WACKER DRIVE SUITE 1330
CHICAGO, ILLINOIS 60606-2902
TELEPHONE (312) 236-0204
FAX (312) 201-9695
mchermn@aol.com

THOMAS F. McFARLAND, JR.
mcfarland@aol.com

STEPHEN C. HERMAN
schermn@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

208

May 16 01 03:21p

City of Creede

719-658-2017

P. 10

05/15/01 TUE 03:16 FAX 402 833 4858

ALLEN -- OMARA

0009

Jacobs & Russell, LLC

(719) 587-9106

P. 1

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,

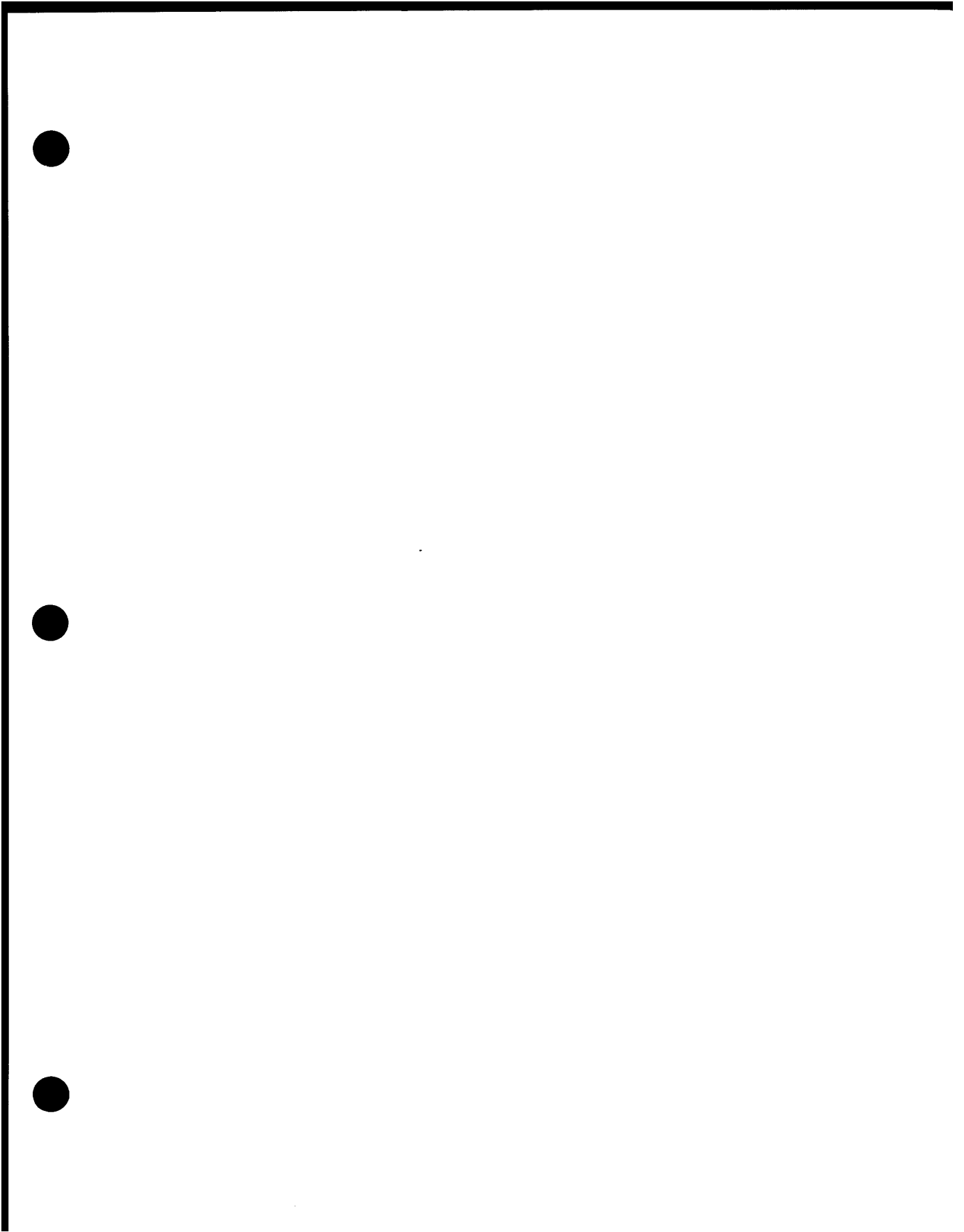
Tom McFarland

Thomas F. McFarland, Jr.
Attorney for Denver & Rio Grande
Railway Historical Foundation

Thel:41 d: hupb, 01/29/01/through 1

cc: Don Shank

209



1 UNITED STATES DISTRICT COURT
2 DISTRICT OF COLORADO
3

4 Honorable Lewis T. Babcock
Chief United States District Judge
5

6 Honorable Craig B. Shaffer
United States Magistrate Judge
7 CIVIL ACTION NO. 01-B-0318

8 -----
DEPOSITION OF DONALD H. SHANK
9 -----

10 CITY OF CREEDE,
a Colorado Municipal Corporation,

11 Plaintiff,

12 vs.

13 DENVER & RIO GRANDE RAILWAY, HISTORICAL FOUNDATION,
a Colorado Not-For-Profit Corporation, and DONALD H.
SHANK,
14

Defendants.
15 -----

16 PURSUANT TO NOTICE, the
17 above-entitled deposition was taken on behalf of the
18 Plaintiff at 44 Cook Street, Suite 1000, Denver,
19 Colorado, on June 21, 2001, at 10:47 a.m., before
20 Jana Mackelprang, Registered Professional Reporter,
21 Certified Realtime Reporter, and Notary Public.
22

23 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
24
25

1 APPEARANCES:

2 For the Plaintiff:

3 GEORGE M. ALLEN, ESQ.
 4 206-A Society Drive
 5 Telluride, Colorado 81435
 6 (970) 369-1000
 7 E-mail: alnoma@yahoo.com

8 For the Defendants:

9 RAYMOND P. MICKLEWRIGHT, ESQ.
 10 Wolf & Slatkin
 11 44 Cook Street, Suite 1000
 12 Denver, Colorado 80206-5827
 13 (303) 355-2999
 14 E-mail: raymicklewright@hotmail.com

15 Also present:

16 B.J. Myers

17 EXAMINATION INDEX

18 BY MR. ALLEN

Page 3

19 EXHIBIT INDEX

20 FOR IDENTIFICATION REFERENCE
 21 Deposition Exhibit 1 38
 22 Printout of an unofficial website for
 23 Denver & Rio Grand Railway Historical
 24 Foundation

25 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500

1 business?

2 A. Residence, (970) 259-5119; office,
 3 (970) 259-9498.

4 Q. What's your date of birth?

5 A. 6/20/49.

6 Q. Social Security number?

7 A. 557-84-2549.

8 Q. What is your relationship to the Denver
 9 & Rio Grande Railway Historical Foundation?

10 A. I'm its founder, board chairman,
 11 president.

12 Q. Are you what we would call the chief
 13 executive officer of the Foundation?

14 A. I am its board chairman, its president,
 15 and its founder.

16 Q. Is there any other executive officer of
 17 the Foundation other than yourself?

18 A. No.

19 Q. So you are not only chief executive
 20 officer, you are its executive officer, the only
 21 executive officer?

22 A. We have a board. We have officers.

23 Q. With regard to the Creede branch of
 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
 24 what was formerly known as the Denver & Rio Grande
 25 Western Railway, is the Foundation presently

1 PROCEEDINGS

2 WHEREUPON, the following proceedings
 3 were taken pursuant to the Federal Rules of Civil
 4 Procedure.

5 * * * * *

6 DONALD H. SHANK,
 7 having been first duly sworn to state the whole
 8 truth, testified as follows:

9 EXAMINATION

10 BY MR. ALLEN:

11 Q. Please state your name.

12 A. Donald Shank.

13 Q. Your address?

14 A. 204 St. Andrews Circle, Durango,
 15 Colorado 81301.

16 Q. Is that your residence, business, or
 17 both?

18 A. Residence.

19 Q. Do you have a business address that's
 20 different from that?

21 A. Yes, I do.

22 Q. What is that address?

23 A. 1474 Main Avenue, Suite 223, Durango.

CALDERWOOD-MACKELPRANG, INC. (303) 477-3500

24 Q. What is the telephone number at the
 25 residence, and what is the telephone number at the

1 providing interstate common carrier by rail?

2 A. At present, no.

3 Q. I'd like you to describe what
 4 activities the Foundation has carried out with
 5 respect to dealing with shippers or potential
 6 shippers on the Creede branch.

7 A. Our interface with shippers at this
 8 time has been minimal. We are in a rehabilitation
 9 phase on the railroad, with a target date yet to be
 10 determined as far as the railroad being operational
 11 and meeting FRA guidelines.

12 We didn't want to get the cart ahead of
 13 the horse and offer something to someone that we
 14 can't deliver.

15 Q. Have you -- let me back up. I'm going
 16 to try to be disciplined about referring to the
 17 Foundation, because I perceive it's the Foundation
 18 and not Donald Shank, which is the entity which has
 19 the rights under the offer of financial assistance.
 20 Is that a fair characterization?

21 A. The Foundation is the legal owner.

22 Q. So I have a tendency to slip into the
 23 use of pronouns, such as "have you," and if the
 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
 24 context of that is that I'm clearly probably talking
 25 about what the Foundation is doing rather than what

1 you are personally doing, I apologize for the
2 ambiguity; but what I am driving at throughout the
3 course of this deposition, unless I tell you
4 otherwise, is information regarding the Foundation
5 and its activities. And if, from time to time, I
6 say, "have you," when the context would indicate
7 what I'm really talking about is has the Foundation
8 done something, filed something, built something,
9 whatever, try to bear with me on that.

10 Let me back up and ask a couple of
11 prefatory questions. You're in good health right
12 now?

13 A. Yes, I am.

14 Q. Are you suffering from any condition or
15 affliction or illness or taking any medication or in
16 any other way dealing with any circumstance that
17 would impair your ability to hear and understand and
18 answer the questions that I ask of you?

19 A. No, other than I'm very tired.

20 Q. Tell me about "very tired," because
21 that can have a bearing. How much sleep have you
22 had, say, in the last 24 hours?

23 A. Three hours.

CALDERWOOD-MACKELPRANG, INC. (303) 477-3500

24 Q. Did you drive up from Durango?

25 A. I drove up from Laughlin, Nevada.

1 circumstances, the kind of case, how you happened to
2 be testifying?

3 A. I was in a deposition approximately two
4 or three months ago. A railroad related issue, but
5 not pertinent to this railroad.

6 Q. Can you tell us what railroad and how
7 you came to be testifying?

8 A. It's regarding the Durango & Silverton,
9 which is the railroad in Durango, Colorado. And I
10 was subpoenaed in as a witness.

11 Q. Were you a party in the litigation?

12 A. Only as a witness.

13 Q. A party means either the plaintiff or
14 the defendant or a third-party plaintiff or
15 third-party defendant or something like that. I
16 take it you were none of those?

17 A. Simply as a witness. It's a very
18 convoluted case, and I don't know all the
19 particulars. I'm not going to go into all the
20 particulars on it. I was in a deposition in the
21 last few months.

22 Q. The reason I'm pursuing this is it may
23 bear on your experience with railroads. I don't
CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
24 want to get into it deeply. Give us a thumbnail
25 sketch of what the case was about and how you

1 Q. Where is Laughlin? West of Las Vegas?

2 A. Yes.

3 Q. So I-15 to I-70?

4 A. I-15 to I-40 to I-25.

5 Q. In a straight shot?

6 A. 15 to 16 hours of driving yesterday.

7 Q. So I can quit feeling sorry for myself
8 about what Frontier Airlines did to me last night?

9 A. Yeah, I should be so fortunate.

10 Q. So you were sitting there holding a
11 wheel?

12 A. That's correct.

13 Q. Putting a lot of the western United
14 States under you as you got here?

15 A. That's correct.

16 Q. If you don't understand something I ask
17 you --

18 A. I'll ask for clarification.

19 Q. -- ask me to clarify it, and I'll try
20 to do so.

21 Have you previously participated in a
22 deposition or any circumstance where your testimony
23 was taken under oath?

CALDERWOOD-MACKELPRANG, INC. (303) 477-3500

24 A. Yes.

25 Q. Could you describe briefly those

1 happened to be a witness.

2 A. It's over the manner in which First
3 American Railways, ultimately American Heritage
4 Railways, purchased the Durango & Silverton, and
5 it's over a malpractice suit between a law firm and
6 another. And at one point, I was an active buyer of
7 that line, so my testimony was deemed important to
8 the case.

9 Q. Did you actually buy that line?

10 A. No.

11 Q. Have you either directly or through any
12 entity in which you were a participant or whatever
13 bought any other rail lines other than the rail line
14 that's at issue in this litigation?

15 A. Again, you're saying "I." It's the
16 Foundation --

17 Q. This one, I do mean you. Have you
18 personally or the Foundation ever been involved in
19 the purchase or have any ownership role of any other
20 rail lines other than this one?

21 A. No.

22 Q. I want to go back to shippers. What
23 context, if any, have either you personally or the
CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
24 Foundation had with any prospective shipper?

25 A. I have had dialogue with a couple

1 different individuals who have expressed a desire,
2 at some point in time, to be able to ship product on
3 the railroad.

4 Q. Who are the individuals?

5 A. I don't have their names in front of
6 me, and I do not recall at this moment. One of them
7 resides in Del Norte. Another one called me from
8 Creede for some potential aggregate business.

9 Q. What was the nature of the business or
10 product that might have been shipped by the Del
11 Norte shipper?

12 A. Aggregate, rock.

13 Q. Rock, I understand.

14 Let me ask you about some Creede
15 businesses. Have you had any communication or
16 contact with Tompkins True Value Hardware with
17 regard to shipping anything in which they're
18 involved, lumber, building products, anything of
19 that nature?

20 A. Not at this time.

21 Q. Have you or the Foundation ever had any
22 such contact with Tompkins?

23 A. I have had contact with Tompkins.

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24 Q. With regard to potentially shipping?

25 A. No.

1 Q. What is your perception at this time as
2 to whether or not Tompkins True Value is or is not a
3 potential shipper of freight over the Creede branch?

4 A. I think that possibly, at some point in
5 time, they could become a potential shipper and
6 receive lumber and building materials within the
7 City of Creede.

8 Q. But, at this time, you don't have any
9 quantified -- "you," meaning you or the Foundation
10 -- do not have any quantified or defined undertaking
11 by them to ship anything; is that a fair statement?

12 A. Yeah, at this time, we do not.

13 Q. So if we were to ask, will that
14 business be a shipper on the Creede branch, at least
15 as of right now, the answer would have to be
16 negative, as far as we know?

17 A. I wouldn't say that. Potentially, they
18 could become a shipper on the line. At this moment,
19 they are not. We have not entered into dialogue
20 along those lines because, as I stated earlier,
21 we're not sure as to what date we're going to have
22 the line rebuilt. We've had a number of setbacks.

23 Q. At this point in time, it would not be
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24 possible to quantify in either tonnage or volume or
25 dollar value or dates anything with relation to what

1 Tompkins True Value Hardware might ship; is that a
2 fair statement?

3 A. That's a fair statement.

4 Q. Would the same statement be true with
5 regard to Double D Log Homes?

6 A. That's a fair statement.

7 Q. Would the same statement be true with
8 regard to Kolisch Lumber?

9 A. At this time, uh-huh, fair statement.

10 Q. Would that be a fair statement with
11 regard to Kentucky Belle Market?

12 A. That's a fair statement.

13 Q. Would that be a fair statement with
14 regard to Silver Dollar Liquor?

15 A. Yes.

16 Q. A fair statement with regard to Creede
17 Country Club?

18 A. Yes.

19 Q. A fair statement with regard to Rare
20 Things?

21 A. Oh, yes.

22 Q. A fair statement with regard to San
23 Juan Sports?

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24 A. Uh-huh, yes.

25 Q. Rather than require an answer case by

1 case for about 10 businesses, I'm just going to read
2 them all off. I'd like you to wait until I have.
3 If there are any that that would not be a fair
4 statement -- Mountain Memories, Creede T-Shirt
5 Company --

6 MR. MICKLEWRIGHT: I'll object to the
7 form of this question. If you'd frame this first in
8 the form of a question.

9 MR. ALLEN: Yes.

10 Q. (By Mr. Allen) With regard to the
11 prior series of questions, that is, would it be a
12 fair statement at this time that you cannot quantify
13 either by volume, weight, dollar value, or potential
14 time of shipment any prospect of shipment, I want
15 that question answered with regard to the following
16 businesses, which I shall enumerate: Mountain
17 Memories, Creede T-Shirt Company, Quiller Gallery,
18 Ramble House, Abbey Lane Gallery, Amethyst Emporium,
19 Holy Moses, Basky Gallery, Creede Gallery, Mountain
20 Home Accents, Creede Trading Post.

21 A. I have not spoken with any of those.
22 Yes, that would be a fair assumption at this point.

23 Q. Now, going outside of Creede, with
CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
24 regard to South Fork, are there any businesses or
25 government operations or anything else that might

1 have implications of shipping freight in the South
2 Fork area as to which the last question would not be
3 a fair statement?

4 A. I have not spoken with anyone down
5 there.

6 Q. So, then, with regard to all of the
7 businesses presently being carried out in the South
8 Fork area, it would be fair to say, would it not,
9 that you could not say at this time --

10 A. Excuse me.

11 Q. Sure.

12 (Interruption in the proceedings.)

13 Q. (By Mr. Allen) So, to recapitulate,
14 it would be a fair statement that with regard to, so
15 far as you know, all of the businesses in the South
16 Fork area, you could not at this time quantify any
17 potential weight, volume, dollar value, or time at
18 which any of them might be shippers over the Creede
19 branch?

20 MR. MICKLEWRIGHT: I'll object to the
21 form of the question.

22 MR. ALLEN: I'm happy to rephrase. Why
23 don't you give me your objection.

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25 MR. MICKLEWRIGHT: I don't want to do
any talking objections, but you used the word

1 present knowledge with regard to any specifics that
2 might relate to them for any shipping they might do
3 in the future?

4 What I want to do is not merely say
5 everybody in the world might be a shipper. I want
6 to be able to say there is no present knowledge in
7 terms of weight, volume, dollar value, or time of
8 potential shipment as to anyone.

9 Q. (By Mr. Allen) Let me start with the
10 omnibus question which I usually put at the end,
11 let's do it now: Is it a fair statement as to the
12 entire world, that at the present time, neither you
13 personally nor the Foundation can make any statement
14 with any specifics as to the weight of what might be
15 shipped, the volume of what might be shipped, the
16 dollar value of what might be shipped, or the time
17 of when anything might be shipped as to any
18 potential shipper?

19 A. At this time, we do not have any
20 specifics as to weight, volume, rate, et cetera. As
21 I said, we have had preliminary dialogue with a
22 couple people, but, again, we want to make sure
23 that, one, we are going to get this railroad rebuilt
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24 and in a timely manner and establish an operational
25 date to where we can go to these people and say, We

1 "potential." And there's a difference between what
2 is today and what might be in the future.

3 MR. ALLEN: Sure, but what I'm trying
4 to get at is present knowledge, Ray. What I'm
5 trying to do is say as of this moment today. I
6 recognize that tomorrow BMW may decide to
7 manufacture automobiles in South Fork and have huge
8 requirements to build a 200,000-square foot factory
9 and employ 3,000 people and have all kinds of
10 shipping requirements. So anything is possible.
11 What I'm talking about is present knowledge as to
12 anyone who has been identified thus far as to actual
13 quantitative information, that is, the volume they
14 might ship, the weight they might ship, the dollar
15 value of what they might ship, or when they might
16 ship.

17 MR. MICKLEWRIGHT: I think that's the
18 question you mean to ask, but the way in which it's
19 phrased is ambiguous, because I think each one of
20 the people on the list that you've enumerated is a
21 potential shipper. Are they shipping now -- I think
22 you're meaning to ask are they shipping now? And
23 his answer is no, they're not.

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25 MR. ALLEN: Right, and then my next
question, and the heart of this is, is there any

1 will be able to deliver goods on such and such a
2 date, and be able to adhere to that, rather than
3 guessing for next year, but it's really going to be
4 two. We want real numbers for people because I
5 don't want to offer something that we can't deliver.

6 Q. That means as of this moment, while you
7 contemplate an undertaking to rehabilitate the rail
8 line, you don't have any specific knowledge as to
9 what freight may be shipped over it; is that fair to
10 say?

11 A. Correct, that's fair to say.

12 Q. You don't have any knowledge as to what
13 the revenue yield from shipping any such freight
14 might be?

15 A. We have not established it at this
16 time.

17 Q. Does the Foundation have any tariffs on
18 file with the STB, Surface Transportation Board,
19 with regard to freight shipment at the present time?

20 A. Not at this time.

21 Q. Has the Foundation done anything toward
22 development of filing of tariffs?

23 A. Not at this time.

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25 Q. Has the Foundation contracted with,
hired, interviewed, or otherwise communicated with

1 any person who has special knowledge or expertise
2 with regard to formulating freight tariffs?

3 A. Not at this time.

4 Q. When you say, "Not at this time," with
5 regard to your last several answers, does that also
6 take into account all of the time leading up to now?

7 A. That would be correct.

8 Q. So, at no point, has the Foundation
9 ever contracted with, interviewed, hired, or
10 otherwise communicated with anyone who has
11 specialized knowledge or expertise with regard to
12 promulgating freight tariffs?

13 A. Let me correct that statement. That's
14 actually not accurate. I have had a number of
15 conversations with Fred Jones from Rock and Rail.
16 Fred is chief operating officer for them.

17 Q. They're operating the rail line out of
18 Canon City, through the Royal Gorge?

19 A. Correct.

20 Q. Please describe the nature of those
21 conversations.

22 A. Fred and I have had a number of
23 conversations regarding potential freight business
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24 in and out of the San Luis Valley. Obviously, we
25 want to cultivate business on the Creede branch, but

1 A. I believe that's where their main
2 office is. I've always met Fred over in Pueblo.

3 Q. Do you have any objection to my calling
4 him or someone working on my behalf calling him and
5 asking him about the discussions that he's had with
6 you?

7 A. No.

8 Q. We wouldn't be revealing any
9 confidential information or trade secrets?

10 A. If there's any proprietary information
11 there, I would be sure that Fred would hold it.

12 Q. Does he know that your deposition is
13 being taken in this case today?

14 A. No.

15 Q. How recently have you had discussions
16 with him regarding freight rail activity in the San
17 Luis Valley?

18 A. Fred and I talked probably two weeks
19 ago.

20 Q. Please describe, if you would, the
21 present nature of freight rail activity in the San
22 Luis Valley.

23 A. Freight rail activity in the Valley at
CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
24 the present time is handled by the Union Pacific
25 Railroad. They handle the perlite plant in

1 at a time when we can deliver. Fred and I do
2 maintain a good working relationship, and we will be
3 enhancing that relationship through a business
4 arrangement in the near future. Again, we are
5 looking at acquiring additional rights-of-way moving
6 east in the San Luis Valley, with hopes of
7 cultivating freight business on that portion of the
8 line as well.

9 Fred, being a former Union Pacific
10 employee for a number of years -- he's 37 years in
11 railroading -- recognizes additional potential to
12 freight business in the San Luis Valley, and that's
13 clearly one of the things that we have discussed.

14 Q. What is his full name?

15 A. Fred Jones.

16 Q. How would one go about contacting him?

17 A. Call Rock and Rail.

18 Q. And where are they?

19 A. Their office -- their main office is in
20 Colorado Springs. Typically, you can contact Fred
21 by cell phone. I don't have his card with me, but I
22 can get you that number. Or just call information
23 for Rock and Rail Railroad. I'm sure they'll track
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24 him down for you.

25 Q. They are located in Colorado Springs?

1 Antonito.

2 Q. Let me back up a little, because this
3 is an area I really don't know anything about.
4 Where does rail service connect from the San Luis
5 Valley to the world beyond the Valley?

6 A. Walsenburg.

7 Q. So it goes out of the Valley to the
8 east --

9 A. It goes from Alamosa east to Blanca,
10 Fort Garland, over La Veta Pass, through the Town of
11 La Veta, and down to Walsenburg on the Front Range.

12 Q. That's on an old D&RG?

13 A. It's all part of the old D&RG.

14 Q. Where does it connect?

15 A. North-south line goes over to Pueblo,
16 down to Trinidad.

17 Q. Is there presently regularly scheduled
18 freight rail service over those lines?

19 A. Yes.

20 Q. With what frequency?

21 A. Daily, at least the line -- the run
22 over La Veta Pass into the San Luis Valley is daily.

23 Q. Are any of those services unit trains
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24 hauling either ore or coal?

25 A. Not the one over La Veta. Coal trains

1 -- I'm not sure what all the UP is carrying over the
 2 Front Range.
 3 Q. As far as you know -- what did you say
 4 that is?
 5 A. Perlite.
 6 Q. What is that?
 7 A. It's a component used in glass
 8 manufacturing. I think it's one of the major
 9 components in glass.
 10 Q. Do you know how Union Pacific services
 11 the perlite mine in Antonito? They have a side
 12 track running right into it?
 13 A. Tracks run right down into it.
 14 Q. Does rail service go south out of the
 15 San Luis Valley into New Mexico? I just don't know.
 16 A. There used to be a rail line that went
 17 down into New Mexico, but it was abandoned years
 18 ago. That right-of-way was sold last year to a
 19 gentleman. That line connected at, I think,
 20 Blanca. That was the San Luis Valley Southern. The
 21 San Luis Central still operates from Monte Vista,
 22 which is predominantly, almost all, agricultural out
 23 of there. That connects with the Union Pacific at
 24 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
 25 Monte Vista; and there's quite a bit of freight that
 comes off the San Luis Central.

1 MR. ALLEN: Is that a slate board that
 2 can be used?
 3 MR. MICKLEWRIGHT: Yeah, just open it
 4 up.
 5 MR. ALLEN: I want to ask Mr. Shank to
 6 open it up. I just want to get a sense of this.
 7 THE DEPONENT: You want me to draw you
 8 a map?
 9 Q. (By Mr. Allen) Yes, could you draw a
 10 little map of the rail service in the San Luis
 11 Valley?
 12 A. We'll make this the Front Range. We'll
 13 make this Walsenburg.
 14 Q. So north is at the left?
 15 A. Yeah. Alamosa. This isn't to scale,
 16 obviously.
 17 We'll put a C down here for Creede.
 18 South Fork, Del Norte, Monte Vista, Blanca, Fort
 19 Garland. And at Alamosa, the line goes down to
 20 Antonito. Monte Vista, this would be the SLC. This
 21 would be Center.
 22 Q. SLC is --
 23 A. San Luis Central.
 24 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
 25 Q. Would San Luis Central be called a
 short-line operator?

1 A. It would.
 2 Q. All of that is Union Pacific --
 3 A. Union Pacific runs from Derrick, South
 4 Fork, all the way down here, all the way to Antonito
 5 (indicating). Short-line San Luis Central.
 6 There used to be a line, as I said,
 7 that ran out of Blanca down into here, San Luis
 8 Southern. I believe their main line went down to
 9 Taos.
 10 Q. Would it have gone all the way from
 11 Taos to Santa Fe/Albuquerque?
 12 A. The line used to split there, and the
 13 line from Antonito went on a narrow gage one
 14 direction, and there was also a narrow gage that was
 15 the Santa Fe branch, called the Chilly Line, that
 16 went in the other direction. In fact, the perlite
 17 plant is part of the old main line, down that old
 18 main line branch.
 19 Q. That's helpful. You can sit down
 20 again, if you'd like.
 21 Have you or the Foundation or anybody
 22 employed by you or the Foundation had any
 23 communication with regard to development of shipment
 24 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
 25 of livestock, say, moving cattle or sheep from
 winter range up to summer pasture at Creede or

1 higher in the Rio Grande Valley?
 2 A. Last summer we spoke with a gentleman
 3 that had 2600 head of sheep. We were out there
 4 working on the line. He brought -- 6 o'clock in the
 5 morning, we were awakened by 2600 head of sheep
 6 surrounding our motor home out there, and we got up,
 7 went outside, and talked to the gentleman.
 8 He said, "I used to ship these on the
 9 railroad up to summer range." I said, "Would you
 10 like to do that again? Possibly we can arrange
 11 that." But, of course, try to find a stock car
 12 anymore. They're pretty much nonexistent.
 13 He said he would be interested in doing
 14 so, if we can arrange movement for him. So this is,
 15 again, something that we will cultivate when we get
 16 to that point.
 17 Q. Where do animals come from? Where is
 18 summer range in the Valley?
 19 MR. MICKLEWRIGHT: Objection to the
 20 form of the question. Where do animals come from?
 21 THE DEPONENT: Their mothers.
 22 Q. (By Mr. Allen) I'll break it down.
 23 For sheep and cattle in the San Luis
 24 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
 25 Valley area, where generally is winter range?
 A. I don't know.

1 Q. Are animals taken out of the Valley
2 completely to -- the floor elevation of the Valley
3 -- I'm sorry, I'll withdraw that question -- the
4 floor level of the Valley is mostly over 7,000 feet?
5 A. Correct.
6 Q. Alamosa is 7500 feet above sea level?
7 A. I'm not sure what it is, but it's up
8 there.
9 Q. And Creede is at about 8800 feet in
10 elevation?
11 A. Correct.
12 Q. And I take it summer range or summer
13 pastures lie further up the Rio Grande Valley from
14 Creede; is that fair to say?
15 A. I believe that's fair to say.
16 Q. So assuming that animals are pastured
17 for the winter in the San Luis Valley -- I don't
18 know if that assumption is fair or not, but for
19 purposes of our discussion, I want to make it --
20 assuming that they are pastured for the winter in
21 the San Luis Valley, and then it's desirable, for
22 the summer, to get them up to higher elevations, to
23 do that, if cars could be found, railcars suitable
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25 for livestock could be found, the animals would have
to be loaded somewhere down in the Valley, Del

1 Norte, Monte Vista, Alamosa, Center, et cetera;
2 isn't that correct?
3 A. Somewhere in the Valley.
4 Q. They'd have to be either driven to or
5 trucked to the loading point on the railroad,
6 correct?
7 A. Correct.
8 Q. Then they could ride railcars, if the
9 cars could be found, to Creede, if you had the line
10 open to Creede, correct?
11 A. Correct.
12 Q. Then to get farther up the Valley from
13 Creede, they would again need to be either trucked
14 or driven; is that correct?
15 A. Correct.
16 Q. And the Rio Grande Valley actually goes
17 up valley from Creede some fairly significant
18 distance, does it not?
19 A. Quite a few miles.
20 Q. It goes all the way up to the
21 headwaters on Slumgullion Pass?
22 A. Correct.
23 Q. Do you happen to know that distance?
24 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
25 A. I don't.
MR. ALLEN: We have -- sitting on my

1 left is B.J. Myers, who's the mayor of Creede. Let
2 me ask you: How far is it from --
3 MS. MYERS: That's not the headwaters.
4 The headwaters are actually above the Rio Grande
5 Reservoir. Sun Valley from Creede is probably 30
6 miles.
7 MR. ALLEN: Okay.
8 Q. (By Mr. Allen) Mr. Shank, accepting --
9 so going upstream or up the highway, up Colorado
10 Highway 149 from Creede, one would be in pastureland
11 pretty much all the way to the top of Slumgullion
12 Pass; isn't that right? There may be the --
13 A. There's a lot of private homes, private
14 ranches up through there. To say it's all
15 pastureland, I wouldn't make that assumption; I
16 wouldn't make that statement.
17 Q. There's a lot of potential pastureland
18 as one goes up there; would that be fair to say?
19 A. There is definitely some potential
20 pastureland.
21 Q. And most landowners like to have
22 grazing leases on land because that way they can
23 keep agricultural status for tax purposes?
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25 A. Right.
Q. So it's attractive to landowners to

1 have animals pastured on his or her land for summer
2 grazing because that can maintain agricultural tax
3 status of the land?
4 A. It can be. I'm not going to make an
5 assumption for them.
6 Q. But coming back to reality for you and
7 the Foundation for operating the Creede branch,
8 right now, other than this one conversation you had
9 with a man who was driving his sheep past you, it is
10 a fair statement that you have had no other
11 communications with regard to shipment of livestock
12 on the Creede branch?
13 A. That's correct.
14 Q. And, at present, you could not quantify
15 as to weight, volume, dollar value, or prospective
16 time of shipment anything with regard to shipment of
17 livestock on the Creede branch?
18 A. That's correct.
19 Q. What dollar volume needs to be
20 generated from shipment of interstate freight on the
21 Creede branch in order to pay the cost of
22 rehabilitating the Creede branch and putting it in
23 service and of operating the freight rail service
24 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
25 once it is in service?
A. I don't have that figure in front of

1 me.

2 Q. Does such a figure exist?

3 A. Not at this time.

4 Q. Have any plans been formulated to
5 undertake to develop a projection or a pro forma
6 statement of the number of dollars that will be
7 required to be generated from interstate common
8 carriage of freight in order to support the freight
9 rail operations of the Creede branch?

10 MR. MICKLEWRIGHT: Objection, ambiguous
11 question.

12 Q. (By Mr. Allen) I'd like you to try to
13 answer it, if you could.

14 A. I'd like you to rephrase the question.
15 You lost me somewhere along the line.

16 Q. Sorry. I'll try to do better.

17 What specifics has the Foundation done,
18 if any, to move toward putting together a projected
19 number for the amount of money it needs to generate
20 on some recurring revenue basis, monthly, annually,
21 whatever, daily, what has been done by the
22 Foundation, if anything, to come up with the number
23 of dollars that will be required to be generated on
24 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
25 a recurring revenue basis from shipment of freight
in order to pay for the costs, the two implicit

1 costs, one, rehabilitation of the line and putting
2 it in shape to carry traffic; and, two, the ongoing
3 operating costs of carrying freight rail traffic?

4 A. As far as breaking it down as to what
5 our freight revenues need to be to offset those
6 costs, we don't have those figures at this time. As
7 a charitable foundation, we have been in a
8 fund-raising mode to do an assemblage of funds, to
9 aggregate funds, for the rehabilitation of the
10 line. But, of course, during all this litigation
11 and mud-slinging, if you will, by the City of
12 Creede, it's been very difficult to get into a
13 fund-raising mode.

14 Q. Has this litigation, meaning the
15 lawsuit that I filed back in November 2000,
16 adversely affected the ability of the Foundation to
17 carry out common carriage of freight, interstate
18 freight shipments, by rail?

19 A. Yes, we've been damaged by the filing
20 of the suit.

21 Q. In what way?

22 A. Well, initially we lost a very real
23 investor in the railroad, a family from Texas that
24 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
25 was in their due diligence period. Upon the filing
of the suit, upon that fact becoming aware of, their

1 attorney performing due diligence -- it was the
2 recommendation of the attorney to withdraw from the
3 transaction.

4 Q. Please describe what the transaction
5 would have been.

6 A. It was three brothers and the father
7 bringing substantial cash into the Foundation, into
8 the business, which would have facilitated
9 rehabilitation and equipment acquisition.

10 Q. Please name the three brothers and the
11 father.

12 A. Their last name is Kimbrell,
13 K-i-m-b-r-e-l-l. The brothers were Sean, Casey, and
14 -- the third brother's name escapes me for the
15 moment. The father's name is Don.

16 Q. Where are they --

17 A. Texas.

18 Q. Where?

19 A. Sunray.

20 Q. What part of Texas is that?

21 A. It's up near the border, the northern
22 border of Texas.

23 Q. Do you have a telephone number or an
24 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
25 address for them?

A. Not with me.

1 Q. How about an area code?

2 A. Not with me.

3 Q. Do you recall the area code?

4 A. No, I don't.

5 Q. If I threw out a few Texas area codes,
6 would any of them happen to sound likely?

7 A. Probably not this morning.

8 Q. 713 is Houston.

9 A. No, it's not that. It's not 214; it's
10 not Dallas.

11 Q. 972, Dallas suburbs?

12 A. It's way up close to the border.

13 Q. Oklahoma?

14 A. Either Oklahoma or New Mexico. I was
15 never down there. They were up often.

16 Q. How much money were they going to
17 invest?

18 A. Between 4 and 4.5 million.

19 Q. In what form was that investment to
20 come to you? All cash?

21 A. All cash.

22 Q. What would they have gotten in return
23 for the investment?

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24 A. They would have gotten a substantial
25 portion of the operating company.

1 Q. Is the Foundation the operating
2 company?
3 A. No, the Foundation is the legal owner
4 of the right-of-way.
5 Q. Is there an operating company?
6 A. The operating company will be the
7 Denver & Rio Grande Railway, the original name.
8 Q. Who owns the rights to that name right
9 now?
10 A. I do.
11 Q. How did you -- did Union Pacific assign
12 that as part of the purchase?
13 A. No, they did not.
14 Q. How did you come to own the name?
15 A. I contacted the Secretary of State,
16 Department of Corporations, and asked them if the
17 name was available. They said Denver & Rio Grande
18 Western was taken, but that that was a name that was
19 effectively going to disappear as it merged with the
20 Union Pacific. I asked if Denver & Rio Grande
21 Railway was available. She said, "Yes, it is," so I
22 filed articles.
23 Q. So do you have -- is there a
24 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
25 corporation in existence called Denver & Rio Grande
Railway?

1 Q. Are you a lawyer?
2 A. No.
3 Q. Could you describe your educational
4 background briefly?
5 A. A couple of years of college.
6 Q. At what institution or institutions?
7 A. Mount San Antonio College in
8 California.
9 Q. Where is that? That's a really
10 familiar name.
11 A. Pomona. Walnut to be exact. If you
12 say Walnut, nobody knows where that is. It's right
13 next door to Cal Poly.
14 Q. Cal Poly-Pomona, not Cal Poly-San Luis
15 Obispo?
16 A. Right.
17 Q. Mount San Antonio relays, right?
18 A. It's a track college.
19 Q. It was always a sort of stop on the
20 tour back when there was a major track and field
21 competition in the United States.
22 A. That's correct.
23 Q. Are you a former runner?
24 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
25 A. Yes.
Q. Are you still a runner?

1 A. There is.
2 Q. Is it a for-profit corporation?
3 A. It's a Colorado C corp.
4 Q. C corp is its tax status.
5 A. It's a for-profit corporation.
6 Q. Who is the shareholder, or who are the
7 shareholders?
8 A. Myself.
9 Q. Has that corporation ever had any
10 income?
11 A. No.
12 Q. Has it actually issued shares of stock?
13 A. No, it has not.
14 Q. Has it filed annual reports?
15 A. No, it was simply set up to be the
16 operating company for the railroad, under a lease
17 agreement with the Foundation.
18 Q. Is there a lease agreement between the
19 Foundation and the corporation?
20 A. Yes, there is.
21 Q. Who drew the lease?
22 A. Myself.
23 Q. Did you have legal assistance from a
24 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
25 lawyer?
A. It's been reviewed by a lawyer.

1 A. When I get the chance.
2 Q. Did you run in competitions?
3 A. At times, I did.
4 Q. What events?
5 A. I was a hurdler, I was a miler.
6 Q. What kind of mile time?
7 A. 4:18.
8 Q. Wow. I'm impressed.
9 A. Thank you. That's a lot of years ago.
10 Q. Well, my best mile was 4:40.6. And
11 after that, it was all shin splints and beyond.
12 So a couple of years at Mount San
13 Antonio. Anywhere else for college education?
14 A. No, I was then taken into the service.
15 Q. What branch?
16 A. California National Guard.
17 Q. Did you see action anywhere?
18 A. Yeah, I sure did. We won't go into
19 that. I transferred from the California National
20 Guard to the Colorado Army Reserve.
21 Q. Are you a Vietnam veteran?
22 A. No.
23 Q. You did not serve outside the United
24 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
25 States?
A. Did not serve outside the U.S.

Page 38

1 Q. Were you on active duty, though?

2 A. Yeah, at one point, I was. Honorably

3 discharged in March of '71.

4 Q. Okay.

5 (Deposition Exhibit 1 was marked.)

6 Q. (By Mr. Allen) I've handed you what's

7 been marked as Exhibit 1. Do you recognize what

8 that is?

9 A. Yes.

10 Q. What is it?

11 A. It is a printout of an unofficial

12 website on behalf of the Denver & Rio Grande Railway

13 Historical Foundation.

14 Q. When you say, "unofficial website," why

15 unofficial?

16 A. Because this is not a Foundation

17 website, per se. This was done by Richard Cutter,

18 to the benefit and on behalf of the Foundation.

19 Q. Well, if it had ever reached a point

20 that the URL -- do you know what I mean by "the

21 URL"?

22 A. (Nods.)

23 Q. -- that the URL had value, who would

24 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500

25 have owned the URL for this website?

A. This particular one would have been

Page 39

1 owned by the Cutters.

2 Q. Were there any other websites, or are

3 there any other websites that pertain to the

4 Foundation?

5 A. There was a website that we were going

6 to generate. It was Rio-Grande.org. We tried to

7 keep the name as short as possible. Rio Grande was

8 gone, so it was Rio-Grande.

9 That was simply a one-page. I was

10 waiting for my son to develop that as he was

11 learning working for a company in California.

12 Q. Did you ever light it up and go active?

13 A. It lit up with one page, just gave a

14 very brief statement about the Foundation and the

15 line to Creede, and that was it. It never got

16 expanded.

17 Q. Is it still active now?

18 A. At the time we were effectively ordered

19 to remove all information regarding fund-raising

20 from the Internet, that page was blipped out. I

21 don't even know if it's even an active page at this

22 point. We've got a couple of domain names. At the

23 time, we were told to cease and desist from

24 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500

25 fund-raising.

Q. I take it that you were told to cease

Page 40

1 and desist by your own legal counsel; is that right?

2 A. That's correct. My understanding was

3 that it was an agreement with you.

4 Q. Turning your attention to page 2 of

5 Exhibit 1, this has, I take it, a form that one

6 could have printed out and returned to someone in

7 order to become a member of the Foundation; is that

8 right?

9 A. That's correct.

10 Q. Does the Foundation have members?

11 A. Yes, it does.

12 Q. And have the members become members

13 because they have paid something into the

14 Foundation?

15 A. Most have. There have been some comp

16 memberships, but most have paid a membership fee.

17 Q. Has the aggregate of those payments

18 created a capital fund that is available to bear the

19 costs of rehabilitating and activating the Creede

20 branch in order to be able to carry interstate

21 freight rail service?

22 A. Not at this time.

23 Q. Is there any capital fund at this time

24 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500

25 that is available to bear some part of the cost of

rehabilitation and establishment of the Creede

Page 41

1 branch in order to carry interstate freight rail

2 traffic?

3 A. There is a fund, but it is not

4 capitalized at this time.

5 Q. What do you mean by that?

6 A. We had some commitments for funding for

7 a significant portion of the rehabilitation; but as

8 I stated earlier, the lawsuit, the pending

9 litigation, the continual negative feedback from the

10 Town of -- not from the town, but from certain

11 members of Creede.

12 When we say, "Creede is against the

13 train" -- you don't say that. We've been certainly

14 corrected, as the city council has been corrected,

15 because it's not the whole town that's against the

16 railroad. So certain members of the City of Creede

17 are opposed to the railroad, and they've certainly

18 let that be known as publicly and as far and wide as

19 possible.

20 I believe Sandra Wright, city manager

21 of Creede, went so far as to write an article, write

22 a letter to some of the national railroad magazines,

23 and specifically stating the town's position that

24 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500

25 they don't want it, that they felt that the railway

was going to ruin the town, and trying to cite their

11 (Pages 38 to 41)

CALDERWOOD-MACKELPRANG, INC. 303-477-3500

220

1 positions, their feelings. And all of these things
 2 are very, very damaging to our project, to
 3 fund-raising for the project.
 4 Q. Do you conceive the project, that is,
 5 trying to reactivate the rail line, as being a
 6 matter of public interest in the Creede community?
 7 A. It's a matter of public interest in all
 8 the communities in the San Luis Valley.
 9 Q. It is fair to say, is it not, that you
 10 are a figure who is -- you, Donald Shank, are a
 11 figure generally associated with this?
 12 A. I am.
 13 Q. And, therefore, to that extent, you're
 14 a public figure?
 15 A. To a certain extent.
 16 Q. Well, if I said I consider you a public
 17 figure, you're someone who gets your name in the
 18 newspaper, people know about you who haven't met
 19 you; that's fair to say?
 20 A. I've been in the newspaper a number of
 21 times, yes. Therefore, I would be a public figure.
 22 Q. You agree, do you not, with the
 23 proposition that other people who live in the San
 24 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
 25 Luis Valley or, for that matter, anywhere else in
 the United States have a right to freely express

1 placement memorandum?
 2 A. I know what you mean by that.
 3 Q. Was a private placement memorandum
 4 generated either as a final document or as a
 5 preliminary draft?
 6 A. I have to think back. I don't think
 7 the PPM was generated. I know there was an
 8 agreement. All the documentation had gone before
 9 their attorney, and things were working very well at
 10 that time, until such time as the lawsuit was filed.
 11 Q. Who is their attorney?
 12 A. I don't know her name now. It's a lady
 13 in Pueblo.
 14 Q. Is she in a firm in Pueblo?
 15 A. She is.
 16 Q. Does she practice with Tom Farley in
 17 Pueblo?
 18 A. I don't know.
 19 Q. Do you know Tom Farley?
 20 A. No. The only Farley I know is an
 21 appraiser.
 22 Q. Directing your attention to page 4 of 5
 23 of Exhibit 1 -- there are numbers at the top; it's
 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
 24 in the last part of the document -- you see a
 25 heading there that says, "*D&RG RY Tie Certificate"?

1 their own views, whether in print or orally?
 2 MR. MICKLEWRIGHT: I'm going to object
 3 to this line of questioning because I think it
 4 exceeds the scope of the issue that I think you are
 5 going toward, which is rehabilitation. If we want
 6 to talk about the discourse and elements of a
 7 defamation action, I don't think this is the
 8 appropriate format to do that. It's a waste of our
 9 time.
 10 Q. (By Mr. Allen) If the investment that
 11 you contemplated from -- what was their name? The
 12 Kimbrells?
 13 A. Yes.
 14 Q. -- had actually materialized, that
 15 would have generated a very significant amount of
 16 money, several millions of dollars, correct?
 17 A. Correct.
 18 Q. And they would have been investors in
 19 the C corp that you've established; is that right?
 20 A. They would have been involved in both
 21 the Foundation and the C corp.
 22 Q. Was documentation generated with regard
 23 to that prospective investment?
 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
 24 A. Yes.
 25 Q. Do you know what I mean by a private

1 A. Yes.
 2 Q. I take it this isn't talking about a
 3 necktie that you wear around your neck.
 4 A. No, this is talking about a railroad
 5 tie.
 6 Q. So what you're saying here is somebody
 7 could buy a railroad tie?
 8 A. Correct.
 9 Q. For \$70; is that right?
 10 A. It's \$45.
 11 Q. \$45 nonframed?
 12 A. You get a certificate with it. And if
 13 you want it framed, then it's \$70.
 14 Q. So this would have sold them a tie
 15 that, at one time, had been in use on the line?
 16 A. No. This would purchase a new tie to
 17 the railroad. In other words, it's a replacement
 18 tie to replace one of the worn-out ties on the
 19 railroad.
 20 Q. The framing is the certificate. I got
 21 it. I figured it out. I'm sorry. The framing
 22 would be the certificate, not the tie?
 23 A. Correct.
 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
 24 Q. I was having a very hard time
 25 contemplating how you would frame a railroad tie.

1 Did you sell any?
 2 A. Uh-huh.
 3 Q. How many?
 4 A. I'm not sure what the number is right
 5 now.
 6 Q. Ballpark?
 7 A. Oh, ballpark, probably somewhere in the
 8 vicinity of 100.
 9 Q. So at 45 bucks apiece, that should have
 10 generated \$4500?
 11 A. Correct.
 12 Q. More if they wanted certificates?
 13 A. The certificate you got regardless. It
 14 was whether or not you wanted the framing.
 15 Q. Where and how was the money that came
 16 from the sale of those ties held, or did it simply
 17 go to buy the ties?
 18 A. It went to buy ties. It went to
 19 process certificates and mailing.
 20 Q. Have the ties actually been bought?
 21 A. Some have. They are out there on the
 22 railroad. They are not installed. They're just
 23 stacked on the railroad.
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 24 Q. Where do you go when you want to buy
 25 railroad supplies?

1 for you to establish service on it?
 2 A. We can establish a 65-pound. I've had
 3 a rail inspector from the Union Pacific come out,
 4 and he said, "Don't get in a hurry to replace that
 5 65-pound rail. That's very damn good rail." We've
 6 had very little breakage with that, as opposed to
 7 some of the 85- and 90-pound rail.
 8 Q. Who is that inspector?
 9 A. Hispanic gentleman out of the Valley.
 10 I forget his name.
 11 Q. He works for Union Pacific in the
 12 Valley?
 13 A. He does.
 14 Q. He's a full-time employee now?
 15 A. He is.
 16 Q. Where in the Valley does he work?
 17 A. He works on that division, so he works
 18 on the whole Valley.
 19 Q. Is he the only rail inspector that
 20 Union Pacific has?
 21 A. No.
 22 Q. How many rail inspectors do they have?
 23 A. I have no idea. We're talking about
 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
 24 thousands upon thousands of railroad.
 25 Q. How many in the Valley?

1 A. Pioneer, railyards, railroad supply
 2 stores.
 3 Q. How do they get there?
 4 A. We truck them in.
 5 Q. Are they ever shipped in by rail?
 6 A. They can be, if you have enough
 7 quantity. It's more cost effective to bring them in
 8 by rail.
 9 Q. How many ties are needed in order to
 10 reestablish rail service on the Creede branch?
 11 A. Under FRA regs, there's a Class 2, and
 12 that's a grade level. This is not the same -- it's
 13 the classification of rail rehab. It will be done
 14 as a Class 2 railroad, which is a 25 miles an hour
 15 maximum speed. That calls for eight good ties --
 16 and if you want to get into the classification of
 17 good ties, we can discuss that -- eight good ties
 18 per rail length in a tangent or straight section.
 19 Q. How long is a rail length?
 20 A. 33 to 39 feet, depending upon the
 21 weight of the rail.
 22 Q. What weight is that rail?
 23 A. It varies. It's between 65 and 90.
 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
 24 And there's some 115 pounds.
 25 Q. What weight does it need to be in order

1 A. In his formal position, I think he's
 2 the only one in there. Within a section crew,
 3 there's going to be other men who are qualified, but
 4 as an actual rail inspector, he's their man.
 5 Q. But you asked him to come up and
 6 inspect your railway?
 7 A. I asked him to look at some stuff.
 8 Q. And he did so?
 9 A. Yes.
 10 Q. Was he compensated for that?
 11 A. No.
 12 Q. Was there any written communication
 13 back and forth with him?
 14 A. No. This was done as a friendly
 15 accommodation.
 16 Q. How long ago was that done?
 17 A. Last year.
 18 Q. When last year, do you remember?
 19 A. Last summer. I'm not sure what month.
 20 Q. Can you remember his first name?
 21 A. I am sorry.
 22 Q. Did you meet with him in person?
 23 A. Yes.
 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
 24 Q. Were you there?
 25 A. Yes.

1 Q. You and he were both there?
 2 A. Uh-huh.
 3 MR. MICKLEWRIGHT: You've got to say
 4 "yes" or "no."
 5 THE DEPONENT: Yes. I met him --
 6 initially, I believe it was in Fort Garland. I
 7 talked to a couple other guys there on the section
 8 crew. He drives what's called a high-rail. It's a
 9 pickup truck with railroad wheels that come down so
 10 the truck can go down the tracks. And he just came
 11 right on over. He was over that day and we talked.
 12 I've talked to the train crews a number of times.
 13 Q. (By Mr. Allen) Did he drive the
 14 high-rail up on the Creede branch?
 15 A. He drove it up to the Creede branch.
 16 He wasn't about to bring it on to the property.
 17 Q. That would be in violation of the UP?
 18 A. They don't have authority to run up my
 19 track. I don't have authority to run up their
 20 track. It isn't done.
 21 Q. Have you had discussions with them
 22 about authority to run on their track?
 23 A. I've had a number of discussions with
 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
 24 the Union Pacific about a number of topics,
 25 including authority to run, including acquisition of

1 Q. On gravel roads?
 2 A. Right. That's been the only movement
 3 on the line.
 4 Q. You must drive Wolf Creek Pass all the
 5 time.
 6 A. All the time.
 7 Q. Does CDOT use mag chlor on Wolf Creek
 8 Pass?
 9 A. I don't think they do. Wolf Creek is a
 10 disaster. They're right in the real immediate
 11 construction area. But they water it. It's not
 12 that huge of an area. And they're just constantly
 13 working on it, so it would really be a moot point.
 14 You drive through, then they close it. They
 15 dynamite, they load, they get the stuff out, they
 16 let you back through. They close it. It's a
 17 cycle. They close it 12 hours during the night
 18 Monday through Thursday.
 19 Every time I've come through there,
 20 I've been held for not less than 45 minutes. I came
 21 over for the auction at the lumber mill, and that
 22 was on a Tuesday, about a month ago, and I was held
 23 there for an hour and a half. Then they announced
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 24 that they had overdynamited and the road was now
 25 closed all night -- and this was at 4:30 in the

1 additional rights-of-way.
 2 Q. What's the status of those discussions?
 3 A. Currently as it stands, they would like
 4 to see the suit with Creede resolved. And at that
 5 time, they will discuss further with me purchasing
 6 the line to Del Norte, possibly to Monte Vista. We
 7 want to maintain our connection with the outside
 8 world.
 9 Q. Why would you want -- if the Union
 10 Pacific is running freight trains up to South Fork
 11 and --
 12 A. Well, they're not anymore. When the
 13 lumber mill closed in South Fork, that was the only
 14 real shipper out of that stretch. They don't have
 15 anything in Del Norte to speak of. The only thing
 16 they brought over this year was been some tank
 17 carloads of dust suppressant, probably magnesium
 18 chloride, and they brought those over and dispersed
 19 those on the county roads and highways, whatever.
 20 Q. Who's the shipper on that?
 21 A. I don't know who the consignee is on
 22 that. I'm assuming it's the County.
 23 Q. Possibly the State?
 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
 24 A. Possibly the State, but typically it's
 25 done on county roads.

1 afternoon -- which meant I had to drive all the way
 2 around Chama and Antonito and Alamosa, through the
 3 Valley, to get there. So what should have been a
 4 99-mile drive was 299-mile drive.
 5 Q. But there's a major construction
 6 project going on there?
 7 A. Right.
 8 Q. What are they doing?
 9 A. Widening Wolf Creek. They're taking an
 10 area called The Narrows, and they're supposedly
 11 going to put a tunnel through there, which will be
 12 two lanes one direction and the two existing lanes
 13 will be two lanes the other direction.
 14 Q. Is that the largest construction
 15 project in the area?
 16 A. I'd say it is.
 17 Q. Where are they -- I assume it has
 18 requirements for aggregate and for cement and for
 19 asphalt and all that sort of thing; is that a fair
 20 assumption?
 21 A. That's probably a fair assumption.
 22 Q. And I take it all of that material is
 23 being trucked to the site; is that right?
 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
 24 A. The only thing that's been trucked to
 25 the site to date has been equipment that was brought

1 in long ago, which stays there; and they're just
2 hauling the rock that they're pulling off the
3 hillsides, stockpiling it just a few miles down
4 below the project. The only thing that would be
5 coming in and out would be probably a fuel truck
6 because, effectively, all the equipment stays there.

7 Q. At some point, is it not logical to
8 assume that there will be shipment in of aggregate
9 and asphalt and rebar?

10 A. They're creating all their own
11 aggregate. As far as rebar, sure they'll have to
12 bring that in at some point in time, but right now
13 they create their own --

14 Q. Do you know of any plans to ship
15 anything to this project by rail?

16 A. No, I don't. And if it was, it would
17 be handled by the Union Pacific.

18 Q. What can you tell me about contemplated
19 future construction projects in the Creede area?
20 What do you know of that is going to be built or
21 likely to be built over the next five years in and
22 around the Town of Creede?

23 A. As far as developments, or as far as
CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
24 highway construction?

25 Q. Anything that is construction.

1 contemplated that there would actually be vertical
2 construction, houses or --

3 A. Not that I know of in there.

4 Q. Some sort of modular thing?

5 A. Not that I know of, but we haven't gone
6 that far into the dialogue.

7 Q. But there's constant construction
8 activity from one year to the next of second homes,
9 summer homes, that sort of thing in the Creede area;
10 that's fair to say, is it not?

11 A. Within the Creede area, yes.

12 Q. And that's been going on for literally
13 decades; isn't that correct?

14 A. It has been increasing over the last
15 ten years.

16 Q. Baby boomers retire, they have money
17 with which to go build places, they come to
18 attractive to places such as Creede or Durango, all
19 over the mountain west, rather than Los Angeles or
20 Houston or Dallas to do that?

21 A. It's the whole gamut as far as age.
22 Demographic-wise, we can't say it's just baby
23 boomers. I've seen a broad range of ages coming in
CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
24 and out.

25 Q. And for the past 20-plus years, all of

1 A. Well, as far as residential
2 construction, I know there will be additional summer
3 homes or some year-round homes built within the
4 county. Not a whole lot within the Town of Creede
5 because Creede doesn't have a whole lot of area to
6 build within.

7 A large RV park. Roland Zimmerman has
8 got a 500-unit RV park that's under construction.
9 That can expand to a thousand units.

10 It can't expand (directed to
11 Ms. Myers)? Okay. I understood he had ground that
12 was adequate, if he wanted to put another 500 in.
13 Whether or not that will happen, I don't know.

14 Q. Do you know Mr. Zimmerman?

15 A. We've spoken.

16 Q. Have you spoken with him about becoming
17 a shipper on the Creede branch?

18 A. There really isn't much to ship to the
19 man. We're talking about an RV park.

20 Q. So it's mostly horizontal construction?

21 A. Yeah.

22 Q. Rearranging earth?

23 A. Rearranging earth and placing
CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
24 utilities.

25 Q. Is there any point at which it's

1 the transportation requirements in the Creede area
2 associated with that construction have been served
3 by truck; is that fair to say?

4 A. Yes, since 1985.

5 Q. 1985 is the last --

6 A. The last train ran to Wasson in 1985.

7 Q. And those trains operated to haul ore
8 out of the mine, correct?

9 A. Correct.

10 Q. Do you know of any plans to reestablish
11 mining in the Creede area?

12 A. There's always talk about the potential
13 of a mine reopening, but it would have to be cost
14 effective. And I don't believe at this point in
15 time it is cost effective. But if the price of
16 silver were to increase, because it's predominantly
17 a silver mining area, there could be reactivation of
18 mines, which would lead to potential freight.

19 Q. Where would one find copies of the
20 documentation that went back and forth between you
21 and the Kimbrells?

22 A. In my office.

23 Q. Did you bring any documents with you
CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
24 today?

25 A. I never got near my office. I only

1 found out about this deposition at 9:30 in the
2 morning yesterday. Then I drove straight here. I
3 couldn't drive to Durango to try to get anything
4 because if I had, I wouldn't have made it over Wolf
5 Creek Pass last night, which would have put me hours
6 longer. As it was, it was right at 2 o'clock in the
7 morning when I got in.

8 Q. Are you familiar with what was created
9 by the Foundation or by you or by anyone in
10 communicating with the Kimbrells about this
11 project? I assume you are.

12 A. I am.

13 Q. Did you, in fact, author that yourself?

14 A. The agreement?

15 Q. Yes.

16 A. It was drafted between all of us. I
17 made a draft. They made a draft. We merged the
18 drafts. There would be a rewrite and another
19 rewrite. It was rewritten a number of times.

20 Q. And you still have copies of all that
21 material?

22 A. Most of it.

23 Q. In what form do they exist? Hard copy?

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24 A. Yes.

25 Q. Are they also in any computer format?

1 Q. Do you agree with his historical
2 account of how the Creede branch was built?

3 A. I'm aware of a couple of different
4 accounts of how the Creede branch was built.

5 Q. Correct me if I'm wrong, but I believe
6 his writing is to the effect that David Moffat built
7 the branch at Moffat's expense. And I assume that
8 would have been Moffat and some corporation --

9 A. I can give you a brief history of the
10 synopsis.

11 Denver & Rio Grande built the line to
12 Wagon Wheel Gap in 1883. Wagon Wheel Gap was
13 established as the railhead by General Palmer.
14 General Palmer loved the area and built what is now
15 the 4UR Guest Ranch. Before that it was his private
16 domain, and he brought his wealthy financiers, the
17 mining moguls of the era, and his close family and
18 friends, he brought them to that area by private
19 car.

20 There was a track that ran around the
21 depot there at Wagon Wheel Gap where they used to
22 set out the private cars. There's pictures in the
23 old books of the beautiful old barns sitting there.

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24 That was as far as the line was built.

25 Now, David Moffat co-owned the Holy

1 Could they be e-mailed, for example?

2 A. I don't know if that could be --
3 possibly. I can make you hard copies of it,
4 possibly.

5 Q. What, if anything, was communicated to
6 the Kimbrells with regard to reestablishment of
7 mining activity as a prospective source of shipper
8 revenue on the Creede branch?

9 A. Well, there was always that potential,
10 but the potential of that happening is very remote
11 as far as the real heavy mining operation that
12 Creede historically saw up until the '80s. At this
13 time, I don't think the likelihood of that happening
14 is very good, but that potential always exists. And
15 as far as what was conveyed to them, it was conveyed
16 that this was historically one of the main factors
17 for that railroad being built. And it was one of
18 the guiding forces and the shaping entities for the
19 Town of Creede, was the railroad.

20 Q. Are you familiar with Professor -- the
21 late Professor Atheran's history of the Denver & Rio
22 Grande Railroad?

23 A. Reverend Atheran.

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24 Q. You are?

25 A. Yes.

1 Moses Mine. And this is one of the biggest mines in
2 Creede.

3 Certainly, if I'm wrong in any of this,
4 I'm certain that the mayor can correct me on this.
5 But the ore was being wagoned down the Wasson toll
6 road to the railhead at Wagon Wheel Gap, which was
7 not cost effective. Apparently the Wassons were
8 charging an exorbitant amount to use the toll road.
9 And David Moffat, who was then president of the
10 Denver & Rio Grande, went to the Board and requested
11 them to extend the railhead from Wagon Wheel Gap to
12 Creede. They declined. He continued on his pursuit
13 of the Board for a number of years, trying to get
14 them to extend the railhead. They would not do so.

15 They were in the process of
16 standard-gauging the main line. David Moffat then
17 resigned as president of the Rio Grande and formed a
18 company called the Rio Grande Gunnison Railway.
19 That company is what built the line from Wagon Wheel
20 Gap to Creede. It paid for itself in four months,
21 and the Denver & Rio Grande recognized the value of
22 the line. They leased it and ultimately bought it,
23 and then it became part of the D&RGW.

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24 That's how the line got built.

25 Q. Was the right-of-way acquisition for

1 that line primarily made under the General Railway
2 Act of 1875?

3 A. For the Rio Grande Gunnison
4 acquisition?

5 Q. Yes.

6 A. The majority of that line is held in
7 fee.

8 Q. Really?

9 A. Yes.

10 Q. So your foundation now owns that
11 right-of-way in fee?

12 A. The majority of it is held in fee, and,
13 yes, the Foundation owns that fee.

14 Q. Do you have -- when you obtained what
15 you obtained from the Union Pacific, what
16 documentation did you get?

17 A. We got a deed from the railroad. We
18 got the legal description, which effectively
19 identifies the right-of-way by quarter quarter,
20 quarter section, quarter section.

21 Q. Did you get their plats or their
22 documentation, their historic holding, of the
23 right-of-way?

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24 A. I actually received plat maps, which
25 are called valuation maps, from the D&RGW back in

1 and the Town and your foundation regarding whether
2 there is or is not an --

3 MR. ALLEN: Let me go first, if you
4 will, and then I want to hear your comment.

5 MR. MICKLEWRIGHT: Well, let me object
6 to the form of the question. If you want to lay
7 some --

8 MR. ALLEN: I'm trying to lay some
9 foundation.

10 Q. (By Mr. Allen) I recognize that there
11 is a dispute or a controversy or something other
12 than total clarity with regard to the status of
13 rights as to Section 36, where the points on which I
14 think everybody would agree are: A, it's owned by
15 the State of Colorado, it's school land; B, there
16 certainly was at one time a lease to that to the
17 D&RG. And there is -- there are, I guess, conflicts
18 as to whether or not, from the State's point of
19 view, that lease has or has not expired. And the
20 Surface Transportation Board's stated position on
21 that is that it doesn't matter if that's expired,
22 that may be some source of some private rights back
23 and forth, but for purposes of rail operation, the
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25 STB's position is that the holder of the rights to
operate rail service has rights to operate over that

1 1987 or '88, when I was negotiating with the D&RGW
2 at that time to purchase the Creede branch.

3 Q. Do you still have those?

4 A. I do.

5 Q. Are they of a size that they would be
6 hard to copy?

7 A. They can be copied, but they're big.
8 There's six or eight of them.

9 Q. So it would be like --

10 A. If you want a copy of every one, it's
11 about \$55, I think it is, to copy the set.

12 Q. Do you know as we sit here, on a
13 section-by-section basis, which sections or quarter
14 sections, quarter quarters, are held in fee and
15 which are not up near Creede or Wasson?

16 A. Really, I don't know specifically below
17 the Town of Creede, what quarter quarter or section
18 number. Obviously, we have a controversial area
19 there in Creede, which is Section 36 and also
20 Section 25.

21 Q. 36 is actually fairly easy. That's
22 school land?

23 A. That's school land owned by the State
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24 of Colorado.

25 Q. I realize the dispute with the State

1 section regardless of whether the lease has expired.

2 Does that fairly summarize the
3 situation with regard to Section 36?

4 A. Well, to go back to your discussion,
5 your analogy of this, Denver & Rio Grande Historical
6 Foundation purchased the right-of-way in a
7 contiguous form. They purchased it from milepost
8 299.3 to the end of track in Creede, which is at
9 milepost -- this is also in conflict, but we're
10 going to get this resolved very quickly -- milepost
11 321. It's all-inclusive.

12 Q. Where is milepost 321?

13 A. Windy Gulch, which is above, slightly
14 above, the Town of Creede.

15 MS. MYERS: Yeah.

16 THE DEPONENT: Just slightly above the
17 town.

18 A portion of that right-of-way does go
19 through Section 36 and Section 25. Section 36 is,
20 as you stated, held in fee by the Colorado State
21 Land Board for the use or benefit of the Colorado
22 State School Board, with key verbiage here: Subject
23 to railroad right-of-way.

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24 This has been a controversial issue,
25 but the facts are clear that the right-of-way has

1 never been abandoned, and it is a viable portion of
2 ground to the benefit of the railroad. We've been
3 through this discussion.

4 We were in a meeting in Denver February
5 22nd of last year, which was attended by Merle Knous
6 and Chuck Barnes, mayor of Creede. Both those
7 gentlemen sit on city council, and Chuck was the
8 mayor. And it was made very clear to everyone what
9 existed, what had happened over time, the fact that
10 there had been an agreement dated from 1892, which
11 was superseded by an agreement dated in 1969. Some
12 of the terminology in there was up for debate.

13 Q. (By Mr. Allen) Now --

14 MR. MICKLEWRIGHT: I'm not sure he's
15 done answering your question.

16 MR. ALLEN: I appreciate it, but it's
17 my deposition, and I want to move on to something
18 else.

19 Q. (By Mr. Allen) I think we've got the
20 main contours outlined, which is the State owns that
21 land. You've got a right-of-way across it?

22 A. Correct.

23 Q. Now, Section 25, with regard to Section
24 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
25 holder of the rights under the offer of financial

1 MR. ALLEN: Regardless of the
2 definition of the scope of the deposition, I would
3 very much like to have a clear record on that
4 particular point, which I view to be a really
5 important point in the entire litigation, Ray. And
6 I hate to have to go to the expense of asking to
7 resume this deposition or take another deposition
8 just to get that answer, because I don't think that
9 we have a controversy here.

10 I think there's going to be agreement
11 on what that answer is, or if you've got another
12 substantive objection, like calls for a legal
13 conclusion, I'd like to have that stated. But I'd
14 really like to have an uncontroverted record on that
15 particular point, before this thing winds up in the
16 STB.

17 MR. MICKLEWRIGHT: Well, I thought the
18 other day we had a very clear question-and-answer
19 session with the Court, in which you defined very
20 specific areas of information that you wanted. You
21 would agree with me, I think, that this is not one
22 of those areas?

23 MR. ALLEN: I'm not sure of that
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25 because where I'm going in the very next area of
questioning is -- I think I've exhausted shippers,

1 assistance; is that correct?

2 A. That's correct.

3 Q. Does the Foundation own anything in
4 Section 25 in fee?

5 A. No.

6 Q. Was Section 25 originally acquired,
7 whether by Moffat or by whomever, in fee, or was it
8 acquired by the sort of file-and-use format of the
9 General Railway Act of 1875?

10 A. Through the General Railway Act. It
11 was a congressional grant.

12 Q. Okay. And do you have any basis to
13 disagree that if the line is abandoned and not
14 converted to rails-to-trails use, that then the
15 Section 25 land would revert, because it's in a
16 municipality, to the City of Creede under 43 USC,
17 Section 12?

18 MR. MICKLEWRIGHT: I'm going to object
19 to that as exceeding the scope of the deposition as
20 defined and agreed by the parties and the Court.

21 You don't have to answer that question
22 unless the judge instructs you otherwise.

23 MR. ALLEN: Are you instructing him not
24 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
25 to answer?

MR. MICKLEWRIGHT: Yes.

1 and where I'm going next is the cost of
2 rehabilitating and reestablishing the line.

3 MR. MICKLEWRIGHT: How does this fit
4 into the cost of rehabilitating and reestablishing
5 the line?

6 MR. ALLEN: In this way: In order to
7 rehabilitate and reestablish the line, he's got to
8 get capital raised. I see -- and maybe I'm crazy,
9 but I don't think I am -- a nexus between what you
10 can do to raise capital and what the rights are if
11 there's abandonment.

12 In other words, does somebody who puts
13 capital into this acquire some kind of rights with
14 regard to the Section 25 land, which is very
15 valuable land because it's got commercial buildings
16 on it, that is always going to be poised on the
17 precipice, if you will, of that being lost and going
18 over to the City of Creede if there's abandonment?
19 It's a risk-related issue for me.

20 And, therefore, it relates to how you
21 can raise money, and it relates to how you can get
22 the line reestablished.

23 MR. MICKLEWRIGHT: Well, those are
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25 different questions than you just asked in laying
the foundation for the previous question that I

1 objected to. And I don't have any objection to your
2 asking questions about. Have they calculated in the
3 risk of loss of ownership, for instance, in their
4 fund-raising activities, but I'm not going to allow
5 him to answer questions about whether or not he
6 thinks there has been abandonment of rights-of-way
7 within Section 25.

8 MR. ALLEN: I understand. The cardinal
9 fact I want to establish here is that if there is an
10 abandonment, then Section 25 reverts, unless there's
11 a rails-to-trails conversion under 43 USC, Section
12 12 --

13 MR. MICKLEWRIGHT: I'm going to object
14 to him answering that question because I think, one,
15 it requires speculation; it requires him to draw
16 legal conclusions, and I don't think he's qualified
17 to do that. And I'm not familiar with it and didn't
18 prepare myself for it in order to advise him.

19 MR. ALLEN: Fair enough.

20 (A recess was taken.)

21 Q. (By Mr. Allen) What is it going to
22 cost to get from where you are right now to the
23 first train running up the Creede branch? What's
24 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
25 the cost of rehabilitating that line?

A. The cost to rehabilitate the line

1 would know what we were working within, and we
2 wanted to do some work within the ground there to
3 open up that right-of-way, open up that track, so we
4 could see what condition those ties and rail were
5 in.

6 Q. You've described being at Mount San
7 Antonio College. What did you study there?

8 A. How in the world did we just get from
9 what the cost will be in rehabbing the line to what
10 did I study at Mount SAC?

11 Q. I'll tie it up.

12 A. California business law and premed.

13 Q. Was there anything in studying the
14 California business law and premed that gave you
15 technical disciplinary qualification to evaluate on
16 an engineering or physical basis rehabilitating
17 rail?

18 A. Well, it really doesn't require a brain
19 surgeon to get out there and identify what a good
20 tie is versus what a bad tie is, where you've got
21 bank stabilization problems, where you've got areas
22 where you have to shore up your right-of-way, what
23 it's going to take to replace pilings on a bridge.

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24 I've worked for a railroad.

25 Q. Let me tell you my problem with what

1 itself is in the vicinity of 700,000. Again, that's
2 to a Class 2 level.

3 Q. What physical things need to be done?

4 A. We need -- well, starting at the
5 beginning, we need new ties -- not every tie,
6 obviously -- again, not getting into what qualifies
7 as a good, usable tie versus a tie that has to be
8 replaced. A number of ties have to be replaced.
9 Some rail needs to be replaced.

10 The rail through the Willow Creek
11 reclamation area, when they built the service roads
12 over it, they broke the rail there. Where they
13 buried it, it's created a lot of rust. We tried to
14 do an evaluation of the road, the railroad, within
15 the Town of Creede. Last summer we put up some
16 posts and ran one line of twine around it to
17 evaluate the perimeter so we could do an evaluation
18 in there. 20 minutes after we left, it was
19 destroyed.

20 Q. What was destroyed?

21 A. The posts were all bent over and all
22 crumpled; the twine was all torn up. The people
23 that had done that -- we won't get into that for the
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25 moment, but it was an unfortunate situation. We
wanted to identify some boundaries there so people

1 you're saying and ask you to address it. I have
2 walked close to every foot of the Aspen branch of
3 the Rio Grande, between Woody Creek and Wingo
4 Junction, and most of it, but not all of it, from
5 Wingo Junction down to Carbondale. It's about 25
6 miles of line. And I have read a very comprehensive
7 study of that that was done by Centennial
8 Engineering, which is now MK Centennial, owned by
9 Morrison-Knudsen, that described the cost projection
10 to get that up to a rail line that could be reopened
11 for 15 to 20 -- I can't recall if it was 15 miles an
12 hour traffic or 20 miles an hour.

13 A. I've seen the figures.

14 Q. And that was millions of dollars.

15 A. Right.

16 Q. Now, that line has been out of service
17 about the same number of years as the line that
18 you're talking about. I think the last freight rail
19 service above Carbondale was about 1982 or '83. And
20 I've litigated all of that.

21 A. I'm familiar.

22 Q. So I guess I view myself as competent
23 to read Centennial's report, and as an interested
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25 observer, but certainly not technically competent to
evaluate it other than by looking at what I was

1 walking. I was trying to see evidence of trees
2 growing between the tracks that would have a caliper
3 large enough to say that this tree has been there so
4 long that it makes it unlikely that affidavits that
5 were filed -- and they'd been using it up to 1990,
6 correct, because how would you have a 10-year-old
7 tree growing between the tracks, unless you planted
8 it in?

9 MR. MICKLEWRIGHT: There's a question
10 here?

11 MR. ALLEN: There is a question.

12 Q. (By Mr. Allen) Because I do not
13 consider myself competent to tell a good tie from a
14 bad tie unless the bad tie is falling apart, I'd
15 like to know how you consider yourself competent to
16 make that judgment, rather than hire professionals
17 from a consulting engineering firm or railroad
18 professionals to make that judgment. What
19 experiential background do you have that qualifies
20 you to evaluate rail line from looking at it or
21 digging around it or whatever you do?
22 A. I've been around railroads and rail
23 lines all my life. This is my father's love, and it
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25 passed from father to son. I was pushing trains
around on the floor before I could walk. So I have

1 guessing. But as far as --

2 Q. So --

3 A. Getting back to looking at ties,
4 getting back to what would qualify me to say what is
5 and is not a good tie, first of all, we have the
6 regs from the FRA that includes the verbiage as to
7 what is and what doesn't -- what is and isn't a good
8 tie. There are specs for this. You can say this
9 tie is, or it is cracked to a point where ballasts
10 can come up through it, this or that. But we have
11 all those regs.

12 At this point, we remain fully
13 compliant with the FRA regs in what we are doing in
14 the rehab process.

15 Q. Now, has the Foundation or anyone
16 employed by the Foundation or working on behalf of
17 the Foundation engaged anyone outside the
18 Foundation, any person, entity, company, whatever,
19 consultant, to evaluate the cost of reestablishment
20 of rail service on the line?

21 A. We have not had -- we have not hired a
22 formal firm -- or formally hired a firm to come in
23 and do a detailed evaluation.

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24 Q. Is there anything in the material
25 you've developed in your communications with the

1 walked railroad-track, railroad rights-of-way all my
2 life. I worked for the Katy Railroad in Texas for a
3 number of years.

4 Q. What did you do for them?

5 A. Started out as a pin puller and
6 finished up effectively filling in running the
7 Eureka yard in Houston. I was a switchman, a
8 brakeman, a conductor.

9 Q. During what years were you so employed?

10 A. It was during the '80s, early '80s. So
11 that would have been -- it may have even been 1980
12 through '83, '79 through '83, somewhere in that
13 range. I don't remember exactly.

14 Q. So you've been a railway brakeman?

15 A. Uh-huh, yes.

16 Q. Railway conductor?

17 A. Yes.

18 Q. Belonged to the rail unions?

19 A. Yeah, UTU.

20 Q. Do you still?

21 A. No.

22 Q. When did you last have a card in the

23 UTU?

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24 A. Oh, whenever it was I ceased working
25 for Katy. That would have been probably '83, I'm

1 Kimbrells that speaks to or comments on the cost of
2 reestablishment and rehabilitation of the line?

3 A. Yes.

4 Q. And those are materials that are in
5 your office in Durango?

6 A. That's correct.

7 MR. ALLEN: And I presume, Ray, that if
8 we send you a request for production and bear the
9 copy costs, we'll get copies of those materials.

10 MR. MICKLEWRIGHT: I would assume that
11 they would probably be produced in the context of
12 26(a)(1) disclosures that are due on or about June
13 25th, if not sooner.

14 MR. ALLEN: Okay. You have a draft of
15 a scheduling order that I think put that date at
16 June 30. Am I right? Didn't your draft put the
17 disclosure date at June 30, or am I thinking about
18 another case?

19 MR. MICKLEWRIGHT: I don't recall, but
20 I think I'm right that -- I think at least I'm right
21 that it's June 25th, which is 14 days after --.

22 MR. ALLEN: The 13th.

23 MR. MICKLEWRIGHT: -- the 11th.
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24 MR. ALLEN: Whatever it is, at some
25 point soon, that will be disclosed?

1 MR. MICKLEWRIGHT: Yes.
 2 MR. ALLEN: But not necessarily
 3 produced?
 4 MR. MICKLEWRIGHT: Correct.
 5 Q. (By Mr. Allen) How many bridges are
 6 there on the Creede branch?
 7 A. Five.
 8 Q. What is the nature of their
 9 construction? Are they all wood?
 10 A. All except one -- well, one is half
 11 wood and half steel.
 12 Q. And one of them -- one is half wood and
 13 half steel; the others are all wood?
 14 A. Yes.
 15 Q. And am I correct that there's a
 16 Colorado historical designation on the bridges, so
 17 that their rehabilitation or reconstruction would
 18 require their being redone --
 19 A. In a historic manner.
 20 Q. -- in a historic manner, the same
 21 visual effect?
 22 A. The Creede branch was deemed for
 23 inclusion on the National Register. When you're
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 24 deemed eligible, you might as well be in as far as
 25 the requirements that are put upon you, that they

1 need to be rebuilt in a historical manner.
 2 Q. Does that make the cost greater than it
 3 otherwise would be?
 4 A. In some respects, it can. In other
 5 respects, no.
 6 Q. How much rail needs to be replaced in
 7 order for it to be active again?
 8 A. Oh, do you want that in feet?
 9 Q. I really want it in dollar terms.
 10 A. Well, I have -- what do I have? I'm
 11 trying to remember how many feet I just ordered.
 12 I'm sorry, this is tired coming through
 13 at the moment.
 14 I purchased a bunch of rail which we'll
 15 take delivery on this summer. I'm trying to
 16 remember how many feet we got.
 17 You have to understand -- this is
 18 something I want you to be aware of because I knew
 19 where you were going with your questions on this --
 20 with respect to the Aspen branch and the cost to
 21 rehab that and bring it up to whatever level you
 22 were saying, in a perfect world where you go out and
 23 buy brand-new everything and you hire a contractor
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 24 to come in and install everything, you can certainly
 25 spend a great deal of money. But, as a charitable

1 foundation, we have found it appropriate to
 2 negotiate for the best conceivable deal possible,
 3 whether that is for first quality relay ties, which,
 4 in effect, in layman's terms, are used, which still
 5 have significant life left in them -- there are some
 6 very good deals to be made in purchasing relay ties,
 7 on buying used rail.
 8 When we go out and we buy OTM, which is
 9 other track material, tie plates, bolts, fasteners,
 10 spikes, whatever the case may be, we'll negotiate
 11 for this stuff.
 12 Q. From whom do you make these purchases?
 13 A. It can be anywhere from Pioneer Sand
 14 for ties, or it can be from the railyard in Omaha.
 15 I've got -- I can buy ties there, quality ties,
 16 delivered to South Fork, for 13.95 apiece. But I
 17 can buy used ties other places for 5 to \$6 apiece.
 18 Q. How many total ties need to be bought
 19 in order to reestablish this line?
 20 A. Right now, about 8,000.
 21 Q. At, say, \$10 apiece --
 22 A. That's an average.
 23 Q. \$80,000?
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 24 A. Yes.
 25 Q. What's the labor cost to put them in?

1 A. It depends on if they're put in by
 2 volunteer or if they're put in by a formal employee.
 3 Q. What's the unit of labor required to
 4 put a tie in?
 5 A. Well, again, that depends on if it's
 6 done in a mechanized manner or if it's done in a
 7 nonmechanized manner. We don't intend to do a real
 8 big tie replacement program using manual labor.
 9 We're going to an auction this summer, at which
 10 there is a tamper and tie finger, which is a tie
 11 installer/remover. We've already purchased some
 12 maintenance-of-way equipment. We purchased that at
 13 the Union Pacific auction this year.
 14 Q. What did you buy and what did you pay
 15 for it?
 16 A. We bought a rail anchor installer. And
 17 a rail anchor is the steel piece that clamps next to
 18 the ties on both sides and on the bottom of the
 19 rail. We bought it more as an operational hydraulic
 20 platform than we did anything else because, from
 21 that platform, we can run other tools. We can run
 22 spike removers, spike installers, hydraulic in
 23 nature. You can run rail saws, rail drills from the
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 24 hydraulic platform. This piece of equipment
 25 probably sold new -- I'm going to guesstimate -- for

1 Q. Do you have any reason to believe that
2 there's anything about these discussions that
3 involves confidentiality, proprietary information,
4 or trade secrets of the Union Pacific?

5 A. No.

6 Q. Do you assert that there's any
7 proprietary information or there are any trade
8 secrets with regard to your participation in these
9 discussions with the Union Pacific?

10 A. With respect to our side?

11 Q. Right.

12 A. Potentially.

13 Q. What is -- what are the contours of
14 your assertion of confidentiality or invasion of
15 proprietary information or trade secrets pertaining
16 to these discussions you say you're having with the
17 Union Pacific?

18 A. I'm sorry, can you rephrase that?

19 Q. What are the contours, what are the
20 boundaries, how would you describe what is
21 proprietary or what is confidential, and what are
22 the reasons why you cannot disclose it?

23 A. If it deals with the future business
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24 plan on behalf of the Foundation or the railroad or
25 something that we may or may not entertain or may or

1 A. Yes.

2 Q. We've talked about shippers?

3 A. Yes.

4 Q. Now I want to find out about cost. And
5 to the extent that you've been having discussions
6 with the Union Pacific that you say do not implicate
7 trade secrets or confidential or proprietary
8 information on the part of the Union Pacific, I fail
9 to see any reason why that implicates trade secrets
10 or proprietary information or confidential
11 information with respect to your Foundation.
12 Therefore, I want to inquire into it.

13 MR. ALLEN: Now, Ray, in order to
14 inquire into it -- and I recognize the sensitivity
15 of Mayor Myers' position. She's a public
16 officeholder; she has a fiduciary duty to her
17 constituents and to the City of Creede.

18 THE DEPONENT: Is that to all her
19 constituents?

20 MR. ALLEN: No, it's to her
21 constituents taken as a body corporate.

22 Here's what I propose so that I don't
23 put her in a bind: I propose a confidentiality
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24 undertaking in which she will absent herself from
25 the room so that she doesn't have to hear it. We

1 may not look at doing. I don't feel this is an
2 appropriate time to air those views, especially in
3 front of B.J., who never hesitates to throw it in
4 the newspaper.

5 Q. Have you at any point read the decision
6 of the Surface Transportation Board rejecting the
7 offer of financial assistance in the Roaring Fork
8 case?

9 A. I've read some of it.

10 Q. In that decision, the Board rejected
11 the offer of financial assistance by a Salt Lake
12 City group which sought OFA rights on the Aspen
13 branch of the Union Pacific because it found that
14 their application did not show adequate shipper
15 demand to meet the ongoing operating costs of
16 providing interstate freight service over that
17 branch. Because of that fact, I perceive that the
18 Surface Transportation Board is concerned with
19 prospective shipper-driven demand and revenue stream
20 with regard to operation of a railroad under an
21 offer of financial assistance.

22 What I'm trying to elicit from you is
23 information with regard to two things: What the
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24 cost will be of providing the service and what the
25 income will be to pay that cost? Okay?

1 shall, when this is transcribed, excerpt it and
2 bracket it or seal it or whatever we need to do so
3 that it doesn't become a public record, but I want
4 to find out so that it can be used with Judge
5 Shaffer, Judge Babcock, and the STB, if it goes
6 there under suitable protections, what it is that
7 has been going on in these plans, or whatever,
8 because I think it's absolutely germane to the
9 merits of this case as to what is going to be the
10 cost of rehabilitating this thing and the cost of
11 operating it.

12 And I realize that maybe he's got
13 business plans that involve competitors, involves
14 whatever, that it's sensitive. I recognize the
15 potential sensitivity. I want to find a means of
16 developing the record. I'm willing to kick my
17 client out of the room. I'm willing myself, as an
18 officer of the court, to be bound by the
19 confidential undertaking.

20 If I say it's not going to go beyond
21 the judges, their clerks, their staff -- and I'm
22 sure Jana will protect its confidentiality -- Ray,
23 that ought to be good enough. I want to get a
CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
24 response to the question. I don't want to put my
25 client in the position where she feels she may have

1 some public duty to disclose. Fine, we'll keep her
2 from knowing it so she doesn't have a problem, she
3 doesn't have to go tell the other members of the
4 Board of Trustees, because she doesn't know.

5 MR. MICKLEWRIGHT: Why don't you give
6 us about two minutes.

7 (A recess was taken.)

8 MR. MICKLEWRIGHT: I'm going to assert
9 that this information is confidential. And while it
10 may not fall within the strict definition of a trade
11 secret, as that word might be defined in the, at one
12 time, proposed Rule 508 of the Federal Rules of
13 Evidence, I certainly think that the disclosure of
14 this information would have the effect of adversely
15 affecting the relationship, under the current
16 circumstances, between the Foundation and the Union
17 Pacific that would ultimately be adverse to our
18 business plan and our proposed course of conduct
19 with respect to rehabilitation of the rail line.

20 Now, having said that, I think one of
21 the obligations that I'm required -- one of the
22 obligations I have is that, with respect to Federal
23 Rule of Civil Procedure 26(A)(1), I probably have a
24 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
25 requirement to disclose who those folks are and
allow the judge to allow you to argue that issue of

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.

9 Q. Have you sought the advice or
10 participation of an investment banking firm in
11 bringing your dream of operating the Creede branch
12 to reality?

13 A. No.

14 Q. Have you sought a credit facility of
15 any kind, bank loan, loan from any other
16 institution?

17 A. No. I've had some preliminary
18 dialogue, but not beyond that point.

19 Q. With whom has that dialogue been held?

20 A. I talked to a couple of local banks in
21 Durango, and I talked to -- I talked to an
22 investment banking firm that has dealt with
23 railroads and this type of venture, but they
24 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
25 demanded such a ridiculous initial fee that I just
promptly ruled them out.

1 whether or not I have to provide further disclosures
2 than certainly their existence.

3 MR. ALLEN: Right, who are they? Who
4 are they?

5 MR. MICKLEWRIGHT: So the answer to
6 that is I'm not going to disclose that unless I'm
7 ordered by the Court to disclose specific names.

8 MR. ALLEN: So you're not going to tell
9 us who it is with whom Mr. Shank or the Foundation
10 have been dealing at the Union Pacific?

11 MR. MICKLEWRIGHT: I think, given the
12 scope of the deposition, the question, I think, that
13 is fair to ask him is: Has he had conversations,
14 and what are they? I think we have asserted the
15 position that it's confidential as to who those
16 discussions have been held with, until we're ordered
17 by the Court to provide that information, because we
18 think it adversely affects our business plan.

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 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
25 respect to rehab costs, operational cost, et cetera,
et cetera, which have been rewritten and rewritten.

1 Q. What firm was that?

2 A. I don't remember the name. It's been
3 some time, and it didn't get beyond the initial
4 contact stage.

5 Q. How long ago was it?

6 MR. MICKLEWRIGHT: Your client is back
7 up here, if she wants to come in.

8 Q. (By Mr. Allen) How long ago was that?

9 A. Last year sometime.

10 Q. So you talked to an investment banking
11 firm that presented you with -- for want of a better
12 term, I will call it a boxcar number that it wanted
13 to get involved on your behalf and -- is that fair
14 to say?

15 A. Yeah, it was packed with front-end
16 fees, and I said no.

17 Q. But you can't remember who it was?

18 A. I don't remember the name.

19 Q. How many investment banking firms do
20 you know?

21 A. I was in the mortgage banking business
22 for a lot of years.

23 Q. So you know everybody?

24 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500

25 A. Well, I read The Scotsman from time to
time, and there's certainly a few names in there.

1 We've dealt with a lot of people.

2 Q. Have you dealt with any of the Colorado
3 investment banking firms or sought to involve any of
4 the Colorado investment banking firms in this
5 project?

6 A. No.

7 Q. Is there any reason why not?

8 A. We simply weren't at that point.

9 Q. What do you view as being the timetable
10 for getting provision of common carrier interstate
11 freight rail shipment going over the Creede branch?

12 A. Our timetable for that?

13 Q. Right.

14 A. Originally we had hoped to be
15 operational by Memorial Day of 2002. I see that
16 down the road now.

17 Q. Do you think it is, for all practical
18 purposes, barring a miracle, impossible for you to
19 get interstate common carriage of freight by rail
20 going over the Creede branch by Memorial Day 2002?

21 A. I don't see it happening. I'm not
22 going to say it's impossible, but I don't see it
23 happening.

CALDERWOOD-MACKELPRANG, INC. (303) 477-3500

24 Q. To what extent do you need to have a
25 tourist train operating over this in order to

1 that there is a basic market demand within the
2 western United States for tourist trains based on a
3 nostalgic view of the past of the West, if you
4 will?

5 MR. MICKLEWRIGHT: I'll object to that
6 as an ambiguous question. What's the question? Are
7 there too many tourist trains?

8 MR. ALLEN: I want to get an admission
9 here that, yes, the tourist train is something that
10 potentially could be made to work.

11 MR. MICKLEWRIGHT: I thought he
12 answered that question.

13 Q. (By Mr. Allen) Do you agree with me?

14 A. Yes, a tourist train is something that
15 potentially can work.

16 Q. That can potentially yield revenue,
17 right?

18 A. Correct.

19 Q. Without a tourist train, is it fair to
20 say that it is doubtful that a freight rail service
21 can be made to work from a financial point of view
22 on the Creede branch?

23 A. I'm not going to say that one or the
CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
24 other can't stand alone. We don't know. We're not
25 operational. We're struggling to get to that

1 provide a revenue stream that would then, in effect,
2 subsidize carriage of interstate freight rail
3 traffic?

4 A. We're clearly looking at a tourist
5 train on this line.

6 Q. It's fair to say -- directing one's
7 attention to Exhibit 1, which is the material from
8 the website -- this has no mention whatever as to
9 anything with regard to carriage of interstate
10 freight rail traffic over the Creede branch; isn't
11 that right?

12 A. We're appealing to the masses on this.
13 Clearly, you have a better chance at bringing in
14 tourists for ridership as opposed to shippers for
15 freight business. We'll work on both.

16 Q. But you have several functioning,
17 viable operations carrying tourists in the area,
18 right, Cumberland Tolltech and Durango & Silverton?

19 MR. MICKLEWRIGHT: Objection,
20 argumentative.

21 MR. ALLEN: I'm trying to establish a
22 Foundation.

23 THE DEPONENT: Silverton is 100 miles
CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
24 away. Antonito is practically the same.

25 Q. (By Mr. Allen) Do they not establish

1 point. We'd be a lot further along if it weren't
2 for this constant road block being thrown in our
3 face, but we can move on.

4 Q. It is fair to say, is it not, that you
5 cannot put anything on this table that separates us
6 right now, whether it's proprietary, trade secret,
7 or otherwise, that gives us any concrete evidence or
8 numbers of a quantitative nature on which we can
9 rely to determine whether or not freight rail
10 service can be established on the Creede branch?
11 Isn't that fair to say?

12 MR. MICKLEWRIGHT: I'm going to object
13 to that because it lacks foundation. Is there a
14 requirement that he do that?

15 MR. ALLEN: That's certainly how I read
16 Roaring Fork in Lancaster County, is that there must
17 be a shipper-driven definition of a revenue stream
18 sufficient to meet the operating cost. Those cases
19 don't even address the cost of creating a rail.
20 They deal with operating rail lines where somebody
21 was talking about either reestablishing or
22 continuing freight rail service. But it seems to me
23 it's pretty clear that they say that you have to
CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
24 have a shipper-driven revenue stream that's
25 sufficient to pay the costs of operating a line. In

1 Roaring Fork, they denied an offer of financial
2 assistance.
3 MR. MICKLEWRIGHT: There's a question
4 there. I just want you to get to it. It sounds to
5 me like: Do you expect to have a shipper-driven
6 revenue stream?
7 MR. ALLEN: I think we've already
8 established he doesn't know.
9 THE DEPONENT: We're not at that point
10 yet.
11 MR. ALLEN: He doesn't know if he is
12 going to have a shipper-driven revenue stream.
13 Q. (By Mr. Allen) You also don't know
14 what the cost will be of establishing the
15 right-of-way and getting operational; isn't that
16 fair to say?
17 A. We have some numbers that we've gone by
18 on that.
19 Q. That's the \$700,000 number, right?
20 A. That's correct.
21 Q. Plus paying the Union Pacific another
22 quarter of a million. So roughly a million dollars
23 gets your debt paid off and gets your line
24 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
25 rehabilitated; am I correct?
A. Approximately.

1 Q. Then do you have any cost projections
2 for the operating cost of providing freight rail
3 service?
4 A. We do.
5 Q. What are those numbers?
6 A. I don't have them with me.
7 Q. What are they approximately?
8 A. I'm not sure. I can't just pull
9 numbers out of thin air.
10 Q. What do you need to buy? You need to
11 buy a locomotive?
12 A. We have one donated to us.
13 Q. Where is it now?
14 A. Brighton.
15 Q. Describe it, if you would.
16 A. It's a GE center cab, 44 ton, diesel
17 locomotive.
18 Q. Where is it right now?
19 A. In Brighton.
20 Q. In whose custody? In Brighton,
21 Colorado?
22 A. Amalgamated Sugar.
23 Q. Is that piece of rolling stock in your
24 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
25 foundation or in an entity controlled by your
foundation?

1 A. It will be. They have agreed to donate
2 it.
3 Q. Is there a written documentation of the
4 agreement to donate it?
5 A. Yes.
6 Q. Where is that documentation?
7 A. In Durango.
8 Q. What vintage locomotive is that?
9 A. 1942.
10 Q. Is it operational right now?
11 A. No.
12 Q. What will it cost to make it
13 operational?
14 A. We're in an assessment stage on that
15 right now. The gentleman that just donated some
16 maintenance-of-way equipment to us has a brother
17 that works for Caterpillar. The locomotive has two
18 Caterpillar diesel engines. He's going to get
19 involved and see what he can do.
20 I have another good friend who has
21 family members who work at Caterpillar, at
22 corporate. He's going to see what he can do.
23 Again, we're a charitable foundation.
24 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
25 Q. So there's a 59-year-old GE diesel
sitting somewhere -- is it on rails right now?

1 A. Yes.
2 Q. When was the last time it operated?
3 A. I'm not sure what year.
4 Q. What other rolling stock do you have
5 for carriage of freight?
6 A. For actual carriage of freight, right
7 now, we don't have any. I've got narrow gage
8 freight cars, but we're not narrow gage at this
9 time.
10 Again, Fred Jones from Rock and Rail is
11 working to line us up some freight cars through
12 Progress Rail. Progress Rail holds the contract to
13 scrap freight cars for Union Pacific. Union Pacific
14 is retiring gobs of railroad cars.
15 Q. All the time, right?
16 A. All the time.
17 Q. What kind of freight cars do you need?
18 A. We'll have a variety, boxcars,
19 gondolas, hobber cars.
20 Q. What would you use hobber cars for
21 other than your own ballasting operation?
22 A. Ballasting operation, possible
23 aggregate business. We're going to acquire cars on
24 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
25 an as-needed basis.
Q. What does it cost to acquire a good

1 used hopper car?
 2 A. Union Pacific is liquidating cars as
 3 low as \$25 apiece.
 4 Q. How many people are you going to need
 5 to employ in order to carry freight over this line?
 6 A. Including section men,
 7 maintenance-of-way? You've got an overlap there
 8 between passenger and freight --
 9 Q. For freight.
 10 A. Just strictly for freight itself?
 11 Q. Right.
 12 A. How many people?
 13 Q. Yes.
 14 A. If I can think back to the model. 36.
 15 Q. At what average annual compensation?
 16 A. It varies because one of the things
 17 that we're going to try to do is to retrain and
 18 utilize people that have been laid off from the
 19 lumber mill in South Fork. That put 110 people out
 20 of work.
 21 Q. That was the last shipper in the
 22 neighborhood, right?
 23 A. That was the last shipper in the
 24 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
 25 neighborhood.
 Q. And it's no longer operational, right?

1 A. That's correct.
 2 THE DEPONENT: Gee, it's noon.
 3 MR. MICKLEWRIGHT: How much more do
 4 you have?
 5 Q. (By Mr. Allen) How much do you think
 6 you'll have to pay each person per month?
 7 MR. MICKLEWRIGHT: You can answer this
 8 last question.
 9 THE DEPONENT: How much are we going to
 10 pay them per month?
 11 Q. (By Mr. Allen) Right.
 12 A. What position?
 13 Q. Average, the whole 36.
 14 MR. MICKLEWRIGHT: If you can, answer
 15 it.
 16 THE DEPONENT: Let's see. If we
 17 average it -- it's a range for salaries because a
 18 brakeman doesn't make what a conductor makes, a
 19 fireman doesn't make what an engineman makes. It
 20 all varies. Let's say \$8 an hour.
 21 Q. (By Mr. Allen) ~~What about the~~
 22 full-time people?
 23 MR. MICKLEWRIGHT: That's the end.
 24 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
 25 MR. ALLEN: Ray, we took breaks. I was
 given three hours.

1 MR. MICKLEWRIGHT: I understand that.
 2 If you want to get the judge on the line and let him
 3 know that I didn't give you enough time, let's hash
 4 it out. I think I was more than fair by waiting 15
 5 minutes for you to show up. That's your time, not
 6 my time. I made it clear yesterday.
 7 MR. ALLEN: I would prefer that you
 8 would agree that we may have another 15 minutes. I
 9 am not going to trouble the federal judge over it.
 10 MR. MICKLEWRIGHT: Absolutely not.
 11 THE DEPONENT: I was here 30 minutes
 12 early.
 13 MR. ALLEN: I appreciate that.
 14 THE DEPONENT: I got three hours of
 15 sleep and drove almost 16 hours yesterday.
 16 MR. ALLEN: It's obvious we'll have to
 17 take another deposition or resume this deposition at
 18 some point anyhow. I think I'd prefer to go a bit
 19 longer; but if you won't agree to it, I'm certainly
 20 not going to bother Judge Shaffer or Judge Babcock
 21 over 15 minutes.
 22 MR. MICKLEWRIGHT: Let me make this
 23 thing come back on and I'll make sure we're clear on
 24 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
 25 what documents I've agreed to provide you.
 MR. ALLEN: Part of the reason I'd like

1 that is I'd like to ask one question as to what
 2 plans, if any, there are with regard to the
 3 marketing agreement in the Hargraves' affidavit.
 4 We'll do a lot of that question and answer.
 5 MR. MICKLEWRIGHT: No. These are the
 6 items that I think you've requested and that we've
 7 agreed to expedite the production on. You've asked
 8 for documents evidencing -- is it Kimbrell?
 9 THE DEPONENT: Kimbrell.
 10 MR. MICKLEWRIGHT: -- the Kimbrell
 11 transaction, including specific information of the
 12 cost of rehabilitation of the rail line and those
 13 incidental issues that are in that sort of
 14 compartmentalized business plan; projection of the
 15 cost of rehabilitating the line, the documents that
 16 sort of substantiate the \$700,000 cost; and to the
 17 extent that there are other documents in that
 18 neighborhood, we'll try to make those available as
 19 quickly as we can.
 20 MR. MICKLEWRIGHT: You have an
 21 opportunity to read and review --
 22 MR. ALLEN: Hold on. Let me make you
 23 an offer.
 24 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
 25 Right now, the record of this
 proceeding is un rebutted that there are no plans to

Page 114

1 do anything with the area of the marketing agreement
2 in the Hargraves' affidavit. You have an
3 opportunity to describe any plans, if you want to
4 take it. If you want to leave the record as it is,
5 I'm happy with that record.
6 MR. MICKLEWRIGHT: Okay. Then I'm
7 happy to leave it the way it is.
8 MR. ALLEN: You have a chance right now
9 to offer a description of the plans, subject to
10 cross-examination, in a way in which you would have
11 a good record on that in any subsequent proceeding.
12 MR. MICKLEWRIGHT: Why wouldn't we be
13 able to do it by affidavit?
14 MR. ALLEN: Because that's not subject
15 to cross-examination; it may not be admissible.
16 MR. MICKLEWRIGHT: All right, I'll take
17 my risks.
18 You'll have an opportunity to read and
19 review your deposition, and I will make sure that
20 the deposition comes to me directly. Then I'll
21 provide it to my client. We generally have to do
22 that within 30 days. I think a three-hour
23 deposition, we can probably accommodate that. So if
24 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
25 you will send it to me, I would appreciate it, and I
will get it read, reviewed, and finalized. And if

Page 115

1 you would also provide me with an ASCII copy or disk
2 copy.
3
4 (Whereupon, the deposition was
5 concluded at 12:10 p.m.)
6
7
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23
24 CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
25

Page 116

1 I have read the foregoing transcript
2 of my testimony and have indicated same by my
3 signature.
4
5 DONALD H. SHANK
6
7 STATE OF COLORADO)
8) ss.
9 CITY AND COUNTY OF DENVER)
10
11 Subscribed and sworn to before me by
12 the said DONALD H. SHANK, this day of
13 , 2001.
14 My commission expires:
15
16
17 Notary Public
18
19 Address
20
21
22
23 Reporter: JM
24 Trial Date: None CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
25

Page 117

1 CERTIFICATE
2 STATE OF COLORADO)
3) ss.
4 CITY AND COUNTY OF DENVER)
5 I, Jana Mackelprang, a Registered Professional
6 Reporter, Certified Realtime Reporter, and Notary
7 Public for the State of Colorado, do hereby certify
8 that previous to the commencement of the
9 examination, the said DONALD H. SHANK was duly sworn
10 by me to testify the truth in relation to the
11 matters in controversy between the said parties;
12 that the said deposition was taken in shorthand by
13 me and was reduced to typewritten form by
14 computer-aided transcription; that the foregoing is
15 a true transcript of the questions asked, testimony
16 given, and proceedings had; that I am not attorney
17 nor counsel nor in any way connected with any
18 attorney or counsel for any of the parties to said
19 action or otherwise interested in its event.
20 IN WITNESS WHEREOF, I have hereunto affixed
21 my hand and notarial seal this 28th day of June,
22 2001.
23 My commission expires: January 24, 2004.
24
25 JANA MACKELPRANG
CALDERWOOD-MACKELPRANG, INC. (303) 477-3500 Registered Professional
Reporter
and Notary Public
CALDERWOOD-MACKELPRANG, INC.

1 CALDERWOOD-MACKELPRANG, INC.
Diamond Hill
2 2480 West 26th Avenue, Suite 130-B
Denver, Colorado 80211
3
4 June 29, 2001
5 RAYMOND P. MICKLEWRIGHT, ESQ.
Wolf & Slatkin
44 Cook Street, Suite 1000
6 Denver, Colorado 80206-5827
7 Re: City of Creede vs. D&RG Historical Foundation
Deposition of: DONALD H. SHANK
8
9 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:
10
11 arranging with us at the number listed below to
read and sign the deposition in our office.
12 XX having deponent read your copy and sign
amendment sheets, if any (original signature
13 page enclosed).
14 reading enclosed deposition, signing attached
signature page and correction sheets, if any.
15
16 XX within 30 days of the date of this letter.
by _____ due to the trial date of _____.
17
18 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
19 the above address.
20 If this matter has not been taken care of within
said period of time, the deposition will be filed
21 unsigned pursuant to the Rules of Civil Procedure.
22 Thank you.
23 JANA MACKELPRANG, RPR, CSR, CRR
CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
24 c: Counsel of Record
25

1 CALDERWOOD-MACKELPRANG, INC.
Diamond Hill
2 2480 West 26th Avenue, Suite 130-B
Denver, Colorado 80211
3
4 GEORGE M. ALLEN, ESQ.
5 206-A Society Drive
Telluride, Colorado 81435
6
7 Re: City of Creede vs. D&RG Historical Foundation
Dear Mr. Allen:
8
9 Enclosed is the deposition of: DONALD H. SHANK
10
11 Previously filed. Forwarding signature page
and amendment sheets.
12 Signed, no changes.
13 Signed, with changes, copy of which is
enclosed.
14
15 Unsigned, notice duly given _____
pursuant to the Rules of Civil Procedure.
Not signed, notice duly given _____
since trial is set for _____.
16
17 No signature required.
18 Signature waived.
19 To be signed in court.
20
21 Signature pages/amendments to be returned to
court on date of trial.
22 Mailed by certified mail # _____
23 Hand-delivered on approximately _____
JANA MACKELPRANG, RPR, CSR, CRR
CALDERWOOD-MACKELPRANG, INC. (303) 477-3500
24 c: Counsel of Record
25

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, 81305, taken at the Law Offices of Michael E.
McLachlan, Esq., 815 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

ANIMAS REPORTING SERVICE

3

1 DONALD H. SHANK,
2 1474 Main Avenue, Suite 223, Durango, Colorado, 81301, was
3 called as a witness, by the Plaintiff, and having been
4 first duly sworn, testified upon his oath as follows, to
5 wit:

EXAMINATION

7 BY MR. GEORGE M. ALLEN:

8 MR. ALLEN: It's 10:34 a.m. We are here in
9 Durango, Colorado, resuming the deposition of Donald H.
10 Shank.

11 Q (By Mr. Allen) Mr. Shank, the Foundation,
12 by which I mean the Denver & Rio Grande Railway Historical
13 Foundation —

14 THE WITNESS: There is one more person
15 coming in.

16 MR. ALLEN: Oh, right, right. You can shut
17 it.

18 THE WITNESS: He'll find his way.

19 Q (By Mr. Allen) — presently has an
20 obligation which will come due to the Union Pacific
21 Railroad to pay a substantial amount of money later on this
22 year and then early next year?

23 A That's correct.

24 Q How much is that that remains to be paid?

25 A Two equal payments of 137,308.

ANIMAS REPORTING SERVICE

2

1 ALSO PRESENT: Mr. Joe W. Burkett
2 Mayor Becky Jean Myers
3 Mr. Brian Matthew Cutter

I N D E X

5	Appearances	Page
6	WITNESS — Donald H. Shank	
7	Examination by George M. Allen	3
8	Witness' Signature/Correction Pages	151/152
9	Reporter's Certificate	153
10	Marked Question	Page 48 Line 11
11	Marked Objection	Page 49 Line 1
12	EXHIBIT	FORMALLY MARKED/IDENTIFIED PAGE
14	1 Petition for Leave to File Offer	
15	of Financial Assistance Out of	
16	Time and Tendered Offer of	
17	Financial Assistance, filed	
18	date April 2, 1999, 15 pages	4

ANIMAS REPORTING SERVICE

4

1 Q It is a fair statement, is it not, that the
2 Foundation does not have money in a bank account right now
3 on which it could write a check to make either or both of
4 those payments?

5 A Not at this moment.

6 MR. ALLEN: Could I mark this
7 entire document, please, Exhibit 1.

8 (Exhibit 1 marked for identification.)

9 Q (By Mr. Allen) I'm handing you what's been
10 marked as Plaintiff's Deposition Exhibit No. 1. It's a
11 copy of the "Petition for Leave to File Offer of Financial
12 Assistance Out of Time and Tendered Offer of Financial
13 Assistance" filed on behalf of the Foundation by its
14 counsel, Thomas McFarland, with the Surface Transportation
15 Board. And the document indicates a date filed of April 2,
16 1999.

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

241

ANIMAS REPORTING SERVICE

1 Transportation Board by Docket No. AB-33 (Sub-No.) -- I
 2 think 13230, but I could be wrong about that number --
 3 "and includes 21.6 miles of right-of-way and track
 4 material. Respectfully submitted this 30th day of March,
 5 1999." Signed, Donald H. Shank.
 6 Handing you that, do you recognize that as your
 7 signature?
 8 A I do.
 9 Q Have you, in fact, made that contribution to
 10 the Foundation?
 11 A Not as yet.
 12 Q Are you in a position to make that
 13 contribution between now and when the first of these
 14 payments comes due on September 1st of this year? And when
 15 I say "are you," are you right now today in a position to
 16 make this \$400,000 contribution to the Foundation in order
 17 that it can make its September payment to Union Pacific?
 18 A As of today, no.
 19 Q Thank you. The next page, Appendix 3 to the
 20 Statement of Financial Condition or to the document filed
 21 with the Surface Transportation Board, is entitled,
 22 "Statement of Financial Condition for Donald H. Shank as of
 23 March 15, 1999."
 24 If you turn the page, you will see the document
 25 which has a number of fax notations at the top right. I

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1 Q The next line item says, "First National
 2 Bank of Durango" and has a checking account number, and it
 3 has the amount of \$8,000. Do you still have a checking
 4 account under that number in that institution?
 5 A No, I do not.
 6 MR. MICKLEWRIGHT: I'm going to object to
 7 this line of questioning. What does this have to do with
 8 zoning?
 9 MR. ALLEN: To put it succinctly, the
 10 defense you've raised to why Creede zoning is not
 11 applicable to the right-of-way is that the right-of-way is
 12 subject to the exclusive jurisdiction of the Surface
 13 Transportation Board, which you have taken the position
 14 defeats zoning.
 15 MR. MICKLEWRIGHT: That's the law,
 16 isn't it?
 17 MR. ALLEN: I'm not going to engage in a
 18 discussion as to whether it is or is not. That is the
 19 position you have taken, as I understand it; and without
 20 elaborating on the complexities of whether that is or is
 21 not the case, the position, as I understand it, the
 22 defense's position, is that this is a railroad right-of-way
 23 owned by the Defendants pursuant to an Offer of Financial
 24 Assistance. The Offer of Financial Assistance included
 25 obligations which are as of yet unmet to Union Pacific;

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1 want to make sure we're both looking at the same piece of
 2 paper. The very top right, it says "Page 12/15." Does
 3 that correspond with what you have on the paper you're
 4 looking at?
 5 A Yes, it does.
 6 Q And under that, it says "Page 12/28," I
 7 think. Then after that, Page 12, this is all the same page
 8 on the top right corner?
 9 A Yes.
 10 Q Directing your attention to the line items
 11 that are shown here. The first line item says Bank of
 12 Durango, checking number, and then it has an account number
 13 and the amount of \$9200. Do you still have a checking
 14 account at the Bank of Durango?
 15 A I do.
 16 Q Is your balance today at or close to \$9200?
 17 A I'm not sure.
 18 Q Do you know what your balance is?
 19 A Not at this moment.
 20 Q Can you give us your best estimate of what
 21 your available balance is in that checking account?
 22 MR. MICKLEWRIGHT: I'll object to
 23 the question. You can go ahead and answer if you can.
 24 A I would guess it's somewhere in the vicinity
 25 of 3,000.

ANIMAS REPORTING SERVICE

1 and, also, it implies an ability to operate a freight
 2 railroad. And other representations are made in this
 3 document that the Foundation will operate a freight
 4 railroad and --
 5 MR. MICKLEWRIGHT: Let me ask --
 6 MR. ALLEN: It's our position -- may I
 7 finish?
 8 MR. MICKLEWRIGHT: Yes.
 9 MR. ALLEN: I'm answering your question.
 10 Our position is that by raising the defense you have that
 11 this is a railroad and not subject to local zoning, that
 12 puts in play, if you will, the entire question of the
 13 viability and capability of actually -- who actually owned
 14 and operated this railroad.
 15 Because if, for example, the answer I get to my
 16 questions cumulatively is, "We don't have any money; we
 17 can't possibly pay the Union Pacific Railroad; and we can't
 18 possibly ever start hauling freight up and down the line,"
 19 then that would mean that Creede zoning would be clearly
 20 applicable, and we wouldn't have the problem of having to
 21 deal with this assertion that it's a railroad that's exempt
 22 from zoning. But the pledge, which is a part of the
 23 operating rights that were obtained in this Offer of
 24 Financial Assistance, is based on the financial statement.
 25 So I want to find out what -- A, I want to test, by

ANIMAS REPORTING SERVICE

9

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

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

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

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

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

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

ANIMAS REPORTING SERVICE

10

1 MR. MICKLEWRIGHT: I understand you may not
2 have been involved, but my understanding is that it's the
3 final decision of the administrative board that it's
4 subject to 28 USC 2344 and I'm going to instruct my client
5 not to answer. It appears to me what you're attempting to
6 do is challenge the validity of — the propriety of the
7 board's decision approving the Offer of Financial
8 Assistance.

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

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

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

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

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

25 MR. MICKLEWRIGHT: They were, is my

ANIMAS REPORTING SERVICE

11

1 understanding.

2 MR. ALLEN: But regardless of that —

3 MR. MICKLEWRIGHT: Well, they had a right.

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

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

15 MR. ALLEN: Let me get all the questions out
16 so we have a fully formed record. And you can take the
17 position you're taking, and I can't stop you from doing
18 that, but I believe that this is the heart of the
19 litigation.

20 MR. MICKLEWRIGHT: I understand that's your
21 belief.

22 Q (By Mr. Allen) Okay. Under cash and cash
23 equivalents in the Statement of Financial Condition, Mr.
24 Shank, we see a total figure of \$18,700. First, is that a
25 substantially accurate figure as to the time when this

ANIMAS REPORTING SERVICE

12

1 financial statement was given, which is dated March 15,
2 1999?

3 A Yes, I believe that's correct.

4 Q Second question, do you presently have
5 available cash and cash equivalents in a range of, and
6 let's say within that number, plus or minus ten percent, in
7 the amount of \$18,700?

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

10 Q (By Mr. Allen) Under "Notes and Loans
11 Receivable" of the Statement of Financial Condition, it
12 lists a second trust deed receivable of \$145,000. Was that
13 a substantially accurate statement as of the time it was
14 made in March of 1999?

15 A It was.

16 Q Can you tell us who was the obligor on that
17 trustee?

18 A It's confidential.

19 Q Well, it's subject to a confidentiality
20 agreement, but I still want the answer.

21 A My brother-in-law.

22 MR. MICKLEWRIGHT: Yeah, it's subject to
23 confidentiality.

24 Q (By Mr. Allen) Has that been paid to you,
25 or is it still owed to him by you?

ANIMAS REPORTING SERVICE

1 MR. MICKLEWRIGHT: I'll instruct the witness
2 not to answer.
3 Q (By Mr. Allen) I'm not going to bother with
4 other loans receivable for \$5400. I don't believe that is
5 a material amount one way or the other. Under investments,
6 there is a line item titled, "Investment with Jeffrey
7 Matz," M-A-T-Z, "Esquire, Phoenix, Arizona." Principal
8 amount of \$100,000 and profits earned as of 3-20-99,
9 available 4-1-99 of \$87,500. So the two taken together
10 would be \$187,500. Was that a substantially accurate
11 statement at the time it was made?
12 A At the time it was made.
13 Q Do you presently have an asset of that kind
14 or character having approximately that value with Mr. Matz?
15 MR. MICKLEWRIGHT: I'll instruct the witness
16 not to answer the question.
17 Q (By Mr. Allen) The next line item is "Stock
18 in privately held corporations." There are three line
19 items. Two are for 5,000 each. I won't bother with them.
20 The third is Borrasca Land and Development, 50 percent
21 owner. First, did I correctly pronounce that?
22 A Borrasca.
23 Q Could you spell it for the reporter so we
24 have a clean record.
25 A B-O-R-R-A-S-C-A.

ANIMAS REPORTING SERVICE

1 financial statement in March of 1999, you were married?
2 A Correct.
3 Q And you are no longer married?
4 A That's correct.
5 Q Are you still involved in a business called
6 The Mortgage Station, LLC?
7 A No, I am not.
8 Q The next line item is "Air Park Village,
9 LLC," 50 percent ownership. Excuse me. Shows a line item
10 of \$250,000. Was that a substantially accurate
11 representation at the time it was made?
12 A It was.
13 Q And you own — when this says 250,000, does
14 that mean that the total of Air Park Village, LLC, was 250
15 and your 50 percent was 125, or does that mean the total
16 was 500 and your equitable interest is 250?
17 A The figure represented here is
18 representative of my 50 percent.
19 Q So then presumably the total then for the
20 entire worth of Air Park Village, LLC, would be about
21 \$500,000?
22 A Yes.
23 Q These are all even numbers. I assume there
24 was not an attempt to state these all out to the last
25 decimal and that these are approximations. Is that fair to

ANIMAS REPORTING SERVICE

1 Q Borrasca Land and Development, 50 percent
2 owner, and it's shown as a line item of \$125,000. Was that
3 a substantially accurate figure at the time that
4 representation was made?
5 A It was.
6 Q And do you presently have a 50 percent
7 ownership in Borrasca Land and Development?
8 MR. MICKLEWRIGHT: I would instruct the
9 witness not to answer the question. Let me restate the
10 basis for the objection. My understanding is that this
11 question has nothing to do with zoning, that it is a
12 belated attempt at an attack on the Offer of Financial
13 Assistance and that to do so would be a violation of 28 USC
14 2344.
15 Q (By Mr. Allen) The next line is — I'm
16 going to back up. Regardless of whether you have any
17 interest in it or not, does Borrasca Land and Development
18 still exist as an entity?
19 A No.
20 Q Next line item shows "The Mortgage Station,
21 LLC, 50 percent, and then in parens, (with wife), close
22 parens, \$40,000. Was that a substantially accurate
23 representation at the time it was made?
24 A Yes.
25 Q Now, as I understand it, at the time of this

ANIMAS REPORTING SERVICE

1 say?
2 A That is correct.
3 Q Is Air Park Village, LLC, still in
4 existence?
5 A It is.
6 Q Are you still a 50 percent owner?
7 A I am.
8 Q Will you tell us whether or not 250,000 is a
9 fair figure for your approximate ownership today?
10 MR. MICKLEWRIGHT: I'll object and instruct
11 the witness not to answer the question.
12 Q (By Mr. Allen) With regard to the final
13 line item here under "Land and Business, 22.66 acres,
14 Highway 160 East," 100 percent owner. I assume that's
15 Highway 160, US Highway 160 in La Plata County, Colorado?
16 A That's correct.
17 Q Is that figure, 450,000, a substantially
18 accurate figure as of the time this representation was
19 made?
20 A It was.
21 Q And are you still the owner of that
22 property?
23 MR. MICKLEWRIGHT: I'll instruct the witness
24 not to answer the question.
25 Q (By Mr. Allen) Well, is there still

ANIMAS REPORTING SERVICE

1 property at that location having roughly that
 2 configuration, 22.66 acres?
 3 A There is.
 4 Q Where is that located on Highway 160?
 5 A That property is located — if you're
 6 familiar with Farmington Hill?
 7 Q I am.
 8 A That's the intersection between 550 and 160.
 9 It is approximately half a mile east on the north side of
 10 Highway 160.
 11 Q Other assets there is shown a figure of
 12 \$495,000 for personal residence in Agoura, California, held
 13 jointly. It says "held jointly." I assume that was held
 14 with your former wife?
 15 A Correct.
 16 Q Was that a substantially accurate figure at
 17 the time it was made?
 18 A It was.
 19 Q Do you still have any ownership interest in
 20 that property?
 21 A No, I do not.
 22 Q Was your ownership interest — where this
 23 says "personal residence, jointly," is 495,000 the net
 24 equity held by both you and your wife at that time?
 25 A Correct.

ANIMAS REPORTING SERVICE

1 Agoura, California?
 2 A No. These were items in the home in
 3 Colorado.
 4 Q Do you still retain the ownership of
 5 substantially all of the items that were described in this
 6 line item as personal furnishings, rare art, ancient and
 7 modern coins?
 8 A I believe so.
 9 Q Does anyone else own any interest in those?
 10 A The only other person that might have an
 11 interest in those would have been my wife. I'm not sure if
 12 they are or not.
 13 Q Do you know who your insurance carrier is?
 14 A Not right off the top of my head.
 15 Q Sorry?
 16 A No, I don't.
 17 Q Do you know who your insurance agent is?
 18 A For automobiles.
 19 Q Let's say you went to your house and you
 20 found that it had burned down or your neighbor told you
 21 that before it burned down, somebody came in and took a
 22 truckload of stuff out.
 23 A Yes.
 24 Q Who would you call to report the loss?
 25 A Probably call my sister.

ANIMAS REPORTING SERVICE

1 Q Did your divorce take place in California?
 2 A Yes.
 3 Q And this was, therefore, a California
 4 community property, if you know?
 5 MR. MICKLEWRIGHT: Objection. Calls for a
 6 legal conclusion.
 7 MR. ALLEN: He can still answer if he knows.
 8 MR. MICKLEWRIGHT: I know. If you know.
 9 A I do not.
 10 Q (By Mr. Allen) In the course of becoming
 11 divorced, did you receive any part of that property or
 12 payment in return for your share of that property?
 13 MR. MICKLEWRIGHT: I'll object and instruct
 14 the witness not to answer the question.
 15 Q (By Mr. Allen) I'm not going to bother with
 16 the 1995 Ford Explorer. "Personal furnishings, rare art,
 17 ancient and modern coins," \$213,000. Was that a
 18 substantially accurate statement at the time it was made?
 19 A Yes, it was.
 20 Q Were those things that were owned
 21 exclusively by you, or were they owned jointly by you and
 22 your former wife, or would it be a little bit of both?
 23 A I believe this was predominantly owned by
 24 me, what is represented here.
 25 Q Were these items that were in the house in

ANIMAS REPORTING SERVICE

1 Q Why?
 2 A She had been my insurance agent for a long
 3 time.
 4 Q And presumably she would know who has the
 5 coverage?
 6 A She probably would.
 7 Q What is her name?
 8 A Margien Gram. M-A-R-G-I-E-N. Last name
 9 G-R-A-M.
 10 Q Where is she?
 11 A Durango.
 12 Q Do you know her phone number?
 13 A 259-5119.
 14 Q Is it okay with you if we call her or
 15 somebody working with us calls her to find out who your
 16 insurance agent is?
 17 A No, it's not all right.
 18 Q Okay. Turning to the next page of
 19 Plaintiff's Exhibit 1. Just so we're on the same page, at
 20 the top right, do you see a notation, a fax notation, that
 21 says all the way across the page, "from Ball Janik, LLP,"
 22 and then it has a phone number, and then it says "Page
 23 13/15?"
 24 A Yes.
 25 Q This shows "accounts and credit cards

ANIMAS REPORTING SERVICE

1 payable" of \$21,300 as of March 15, 1999. Was that a
 2 substantially accurate figure as of the time it was made?
 3 A It was.
 4 Q Contracts payable, a lease on the Durango
 5 residence of \$9,000, and I'm not clear what that means.
 6 Does that mean that you owed \$9,000 to someone?
 7 A The balance of the lease was \$9,000 payable
 8 at 1500 a month.
 9 Q So you were leasing the house in Durango?
 10 A That's correct.
 11 Q For 1500 a month and you had six payments
 12 left on the lease?
 13 A That's what is represented here.
 14 Q And then there was an auto lease payment of
 15 \$377 a month?
 16 A Correct.
 17 Q Okay. First Trust Deed to Bank Boston
 18 secured by a personal residence. Would that have been
 19 secured by the residence in Agoura, California?
 20 A That's correct.
 21 Q That was 62,000?
 22 A At the time.
 23 Q Was that a substantially accurate figure at
 24 that time?
 25 A It is.

ANIMAS REPORTING SERVICE

1 L-A-U-E-R. And Robert McAtee. M-C, capital A-T-E-E.
 2 Q Do you still have an obligation to either
 3 Mr. Shafer or Mr. Lauer or Mr. McAtee secured by this 22.66
 4 acres?
 5 MR. MICKLEWRIGHT: I'll object and instruct
 6 the witness not to answer the question.
 7 Q (By Mr. Allen) Generally, with regard to
 8 these two pages that we've just looked at, which were the
 9 Statement of your Financial Condition as of March 15, 1999,
 10 are these two pages generally substantially accurate as to
 11 your financial position at that time?
 12 A I believe so.
 13 Q What are the financial resources available
 14 to the Foundation for it to get from where it is right now
 15 in terms of what it owns, what it does, what it's able to
 16 do, to a point at some future time at which it can start to
 17 operate freight rail service to the city of Creede?
 18 A The financial strength and financial
 19 availability to the Foundation comes from the donations,
 20 pledges, grants from private individuals, businesses, other
 21 organizations or foundations.
 22 Q Does the financial ability of the Foundation
 23 to get to a point where it might begin to operate freight
 24 rail service depend, to any extent whatsoever, on receipt
 25 of any part of the \$400,000 pledge you made to it?

ANIMAS REPORTING SERVICE

1 Q I take it, since your divorce, you're no
 2 longer obligated on that. Is that correct?
 3 MR. MICKLEWRIGHT: I'll instruct the witness
 4 not to answer that question. Same objection.
 5 Q (By Mr. Allen) Okay. The next line item
 6 indicates a First Trust Deed to Charles Shafer, II, secured
 7 by the 22.66 acres on Highway 160 for \$93,000. Is that a
 8 substantially accurate number as of the time that this was
 9 made?
 10 A It was.
 11 Q Where would one find Charles Shafer if one
 12 were looking for him?
 13 A Well, I would suspect you'd look for him in
 14 his office here in Durango.
 15 Q Is he a businessman, lawyer, or doctor? Or
 16 what does he do?
 17 A Leave off the doctor and you had it right.
 18 Businessman and lawyer.
 19 Q Okay. And then there is a second deed of
 20 trust to Lauer McAtee. Have I said that correctly?
 21 A Yes. It's two gentlemen.
 22 Q Are they also Durango businessmen?
 23 A They are.
 24 Q Could you give me their full names?
 25 A Robert Lauer. Sorry. William Lauer.

ANIMAS REPORTING SERVICE

1 A No.
 2 Q I'd like you to detail what donations,
 3 pledges, and grants you anticipate the Foundation will
 4 receive between now and September 1st of this year.
 5 A Well, I'm not positive what's going to be
 6 coming in between now and then. We've been so damaged by
 7 this lawsuit that's levied against the Foundation by the
 8 city of Creede and, of course, against myself. It's a
 9 matter of public record. We have been -- we've had
 10 investors that were coming into this project that left as a
 11 result of the pending litigation. We've received a
 12 substantial amount of negative press continually as a
 13 result of this. So we've been damaged through the course
 14 of this suit. Union Pacific recognizes that fact.
 15 MR. MICKLEWRIGHT: My understanding of the
 16 question is: You want to know what he expects is coming
 17 in?
 18 MR. ALLEN: Yes.
 19 MR. MICKLEWRIGHT: Right. If you know.
 20 A I don't know at this moment.
 21 MR. ALLEN: Ray, I would appreciate not
 22 having colloquy or objections which tend to suggest an
 23 answer.
 24 MR. MICKLEWRIGHT: Okay. I don't want him
 25 to just ramble on. I want him to just answer the question.

ANIMAS REPORTING SERVICE

1 MR. ALLEN: We've had deposition notices out
2 continually since February, and I would think that you've
3 had more than ample opportunity to counsel with Mr. Shank
4 as to how to deal with questions in a deposition without
5 doing it live here and in person. And he strikes me as a
6 pretty smart guy. If he doesn't know, he's able to say he
7 doesn't know without a suggestion from you that he ought to
8 say he doesn't know.

9 Q (By Mr. Allen) Based on your history of
10 receipt of donations, pledges and grants, what is the rate
11 at which you have been receiving funds from those sources
12 for the Foundation over, say, the past year? That would
13 take you back to, let us say, the last two quarters of
14 calendar 2000 and the first two quarters of calendar 2001.

15 A The rate of receipt of donations and pledges
16 has slowed to a trickle as a result of the negative impact
17 from this suit.

18 Q How much have you spent in legal fees on
19 this suit today?

20 A I'm not positive. Based on current
21 billings, in my position, I know there's still stuff to be
22 billed. It's well in excess of 20,000.

23 Q How much has the Foundation actually paid?

24 A Well in excess of 20,000.

25 Q That's actual payment out?

ANIMAS REPORTING SERVICE

1 want to share my thoughts with you and then base questions
2 on them. It strikes me that getting actual freight rail
3 service up and running between wherever one would contact
4 the Union Pacific, I guess Derrick or out beyond Derrick if
5 they no longer come to Derrick, up to Creede, it's an
6 undertaking that is going to require a lot of work.
7 Bridges have to be dealt with, track, ties, equipment, etc.
8 And that even assuming that you can get some of that done
9 the way you described in your last deposition, by
10 volunteers, buy some things at auctions, buy some things at
11 discounts, we're still talking about an enterprise of a
12 magnitude of at least hundreds of thousands, if not, in the
13 millions of dollars, to do that. It involves running a
14 railroad, which historically in America has been seen as a
15 big undertaking.

16 A Yes.

17 Q You and your counsel have consistently
18 referred to this litigation as being unfounded and you
19 describe having spent about \$20,000 to defend it, which,
20 frankly, in the context of current commercial litigation is
21 a trivial amount of money.

22 A I believe my statement was well in excess of
23 \$20,000.

24 Q Well --

25 A Whatever the case may be.

ANIMAS REPORTING SERVICE

1 A Yes.

2 Q Has any other party, individual entity,
3 corporation of any kind or nature financed any part of the
4 Foundation's expense or your personal expense in defending
5 this litigation?

6 A No.

7 Q For example, have the Wilkersons, who are
8 also involved in the litigation with the city of Creede in
9 which they were represented by the same counsel who
10 represents you, assisted in any way with financing this
11 litigation?

12 A No.

13 Q Was there any request made of them to do so?

14 A No.

15 Q Did they make any offer to do so?

16 A No.

17 Q Has there been any coordination with them or
18 communication with them about this litigation?

19 A The only communication that I had with Mr.
20 Wilkerson was pertinent to the fact that his counsel, in
21 his estimation, was excellent; and he recommended Mr.
22 Micklewright.

23 Q I think that was good advice.

24 A I agree.

25 Q He's a tough opponent. I'm perplexed and I

ANIMAS REPORTING SERVICE

1 Q Well, currently, I'm trying to lay a
2 foundation for the question. I know, without knowing
3 specifics, that from one day to the next, a company such as
4 United Airlines undoubtedly gets sued over people who trip
5 and fall and get injured on their property and things like
6 that.

7 A Yes.

8 Q Or employees who think they got a bad deal
9 and sue the company for claim benefits they're owed or
10 whatever. I would imagine that the Durango and Silverton
11 Railroad has litigation pending against it virtually at all
12 times. You know, employees -- people who have claims or
13 damage from, you know, whatever.

14 Any complex business enterprise has litigation going
15 on most of the time. But I've never thought or had
16 occasion to believe that simply because there might be some
17 lawsuits pending against United Airlines over somebody who
18 got hurt on the premises or hurt on an airplane or lost his
19 baggage or whatever, that that calls into question whether
20 or not United Airlines is going to be able to pay for jet
21 fuel to fuel up the 747s to fly to Honolulu tomorrow.

22 You're describing, as I understand it, a lawsuit of
23 relatively modest dimension that is now only in its second
24 day of depositions, which still has cost your company or
25 your foundation an amount in a modest five-figure range, as

ANIMAS REPORTING SERVICE

1 having had a paralyzing effect on your enterprise.

2 MR. MICKLEWRIGHT: I'll object to that as
3 mischaracterizing the evidence.

4 Q (By Mr. Allen) Well, okay, and if you'll
5 just indulge me for a moment. My choice of words may be
6 inapt, but what I'm trying to convey is, I don't see how,
7 if your foundation had a reasonable chance of getting this
8 railroad running, a lawsuit such as this one, which so far
9 has cost you 20 or \$30,000, could possibly have had any
10 adverse impact on your ability to get this railroad going,
11 if you indeed ever had an ability to get it going. Can you
12 tell me why I'm wrong in that analysis?

13 MR. MICKLEWRIGHT: I'll object as
14 argumentative. If you can, answer it.

15 A I'll answer the question. First of all,
16 you're basing your assumption, your feelings, on the legal
17 cost to defend. Where I have stated to you on more than
18 one occasion, we have been damaged by the adverse effect of
19 negative publicity, the stigma attached to the suit. The
20 20 or 25, \$30,000 that we discussed in the cost to defend
21 is a fraction of the damage done by the negativity attached
22 to a lawsuit.

23 There is so much information that is placed in
24 newspapers and tabloids, on the Internet, regarding this
25 very situation that has had a very large rippling effect

ANIMAS REPORTING SERVICE

1 Q (By Mr. Allen) You mentioned tabloids and
2 the Internet. Can you name or identify any tabloids or
3 Internet communications that you have seen with respect to
4 this litigation?

5 A There are some railroad discussion groups
6 that are on the Internet that are there constantly. I
7 don't remember the exact names. There are a number of them
8 out there. I get stuff sent to me occasionally by e-mail.
9 I know the city manager took it upon herself in one of the
10 railroad magazines — may have been — I'm trying to
11 remember the name. "Railroad Preservation Magazine."
12 Where she wrote an article depicting the position of the
13 city and how they felt I was going to damage the lifestyle
14 and quality of life within Creede. There's been a number
15 of things that have been in place. I can't specifically
16 give you names per se at this moment.

17 Q To what extent, if at all, do you think that
18 your initiating criminal charges against the Creede
19 residents may or may not have contributed to negative
20 attitudes towards your enterprise within Creede?

21 MR. MICKLEWRIGHT: Objection. Relevance.
22 You can answer the question.

23 A It should have created an awakening for
24 people to realize that those folks broke the law. I'm not
25 the one that did; they are.

ANIMAS REPORTING SERVICE

1 negatively for the Foundation. It's not the monetary loss
2 that is so crippling. I hope you understand that now.

3 Q (By Mr. Allen) But — okay. Let me try it
4 another way. If you wrote a check to the Foundation for
5 \$400,000 tomorrow and that check cleared the bank and the
6 Foundation had that \$400,000 in its account, would it not
7 then be able to make its payments to the Union Pacific and
8 make a lot of the other expenditures it needs to make in
9 order to start running freight rail service?

10 A It could meet those expenses if that is the
11 course and direction that we choose to go. If the funds
12 were there to make a payment to the Union Pacific and it
13 was the appropriate time to do so, that's the course that
14 we might take. We are in constant communication with the
15 Union Pacific Railroad. They are quite sympathetic to this
16 situation.

17 Q If this lawsuit had not happened, what would
18 have been anticipated to be the revenue to the Foundation
19 for, say, this calendar quarter by August and September 19,
20 2001, from donations, pledges and grants?

21 MR. MICKLEWRIGHT: I'll object to the
22 question. It calls for speculation. If you can, answer
23 it.

24 A It does call for speculation. I don't know,
25 because that's not the case.

ANIMAS REPORTING SERVICE

1 Q (By Mr. Allen) What was the outcome of
2 those prosecutions?

3 A I made a goodwill gesture at the holidays.
4 I dropped the charges. The DA said we had a case and a
5 strong one at that.

6 Q Who is the DA?

7 A He's over in Alamosa. Sorry. I don't
8 remember his name.

9 Q Did he say that to you personally?

10 A Yeah.

11 Q When did he say that?

12 A At the time I dropped the charges.

13 Q Did he urge you not to do so?

14 A He said, "You have a case. It's up to you."
15 They wanted to send me some victim — what is it called?
16 Victim compensation forms?

17 MR. MICKLEWRIGHT: Victim impact statements?

18 A Something along those lines, but I said,
19 "No," that I want to drop this issue. I want people to
20 clearly understand that we would not tolerate individuals
21 breaking the law, damaging property of the railroad. And
22 during the holidays, I chose to drop the charges as a
23 goodwill gesture.

24 Q (By Mr. Allen) Have you kept copies of
25 these Internet communications that you say have damaged you

ANIMAS REPORTING SERVICE

1 within the railroad groups?
 2 A I may have a couple of them. Most of them I
 3 just trash.
 4 Q We just spent two hours going through what
 5 were represented to us to be all of your records, and I
 6 didn't see any such communications.
 7 A Then I must have trashed them.
 8 Q By tabloids, are you referring to an article
 9 in the "Westword Magazine" in Denver?
 10 A That was certainly a large article that ran.
 11 Q Have you made any demand on "Westword" for
 12 retraction or correction?
 13 A No.
 14 Q Do you, within the Foundation, maintain any
 15 relationship either in-house or on a consulting basis with
 16 any firm handling public relations?
 17 A Not at this time.
 18 Q Is there any reason not to have retained
 19 public relations counsel for the Foundation?
 20 A Is there a reason why we did not?
 21 Q Right.
 22 A We simply did not do it at this time. We
 23 wanted to get further into this project.
 24 Q Have you ever been involved as an executive
 25 officer in any other business enterprise of this size or

ANIMAS REPORTING SERVICE

1 respond to most. There is a lot of information that comes
 2 across that I simply get rid of. There isn't time to
 3 respond to everything that we see, everything that we get.
 4 I do make it my goal to respond to as much of it as I can.
 5 And as far as — you know, I field a lot of phone calls,
 6 but then I'm also in the field a lot rebuilding the
 7 railroad.
 8 Q Has your foundation done anything proactive
 9 to deal with its negative image problems?
 10 A We have.
 11 Q Describe what that has been.
 12 A We show the public our progress with this
 13 project on an unofficial Web site on the Internet.
 14 Q Is that site up and running now?
 15 A It is.
 16 Q What is the URL for that route?
 17 A www.wagon-wheel-gap-route.freehomepage.com.
 18 Q Wagon-wheel-gap-route dot?
 19 A Dot freehomepage.
 20 Q All one word?
 21 A All one word, dot com.
 22 Q Do you monitor the number of hits on that
 23 site?
 24 A I don't. The people who own the site do.
 25 Q Who owns the site?

ANIMAS REPORTING SERVICE

1 complexity?
 2 A Are you talking railroad related, or are you
 3 talking about just —
 4 Q Anything.
 5 A I've been involved in a number of
 6 businesses.
 7 Q As an executive officer?
 8 A Yeah.
 9 Q Is it a fair statement that many, if not
 10 most, businesses that have say assets or a scale of
 11 operation of a million dollars or more engage either
 12 in-house staff people or engage outside public relations
 13 consultants?
 14 MR. MICKLEWRIGHT: I'll object to the
 15 question. Calls for speculation. If you know what most
 16 companies do.
 17 A I'm not going to speak for most companies.
 18 I know where we are with this foundation at this moment
 19 and, at this moment, that is not an avenue we are pursuing.
 20 Q (By Mr. Allen) So your foundation does not
 21 have any structure by way of someone whose job it is to
 22 monitor press comment, for example, or Internet comment and
 23 respond to it and provide public information to deal with
 24 what you characterize as negative publicity?
 25 A That's not correct. I myself personally

ANIMAS REPORTING SERVICE

1 A Richard Cutter.
 2 Q Do you know from him the number of hits on
 3 some regularized basis, daily, weekly, monthly?
 4 A Not at this moment.
 5 Q Do you have any sense of the number of
 6 unique visitors to that site on any recurring basis?
 7 MR. MICKLEWRIGHT: Objection. Relevance.
 8 If you can, answer the question.
 9 A I'm not sure what the number is.
 10 Q (By Mr. Allen) Do you have any sense of the
 11 number of page views on any recurring basis, daily, weekly
 12 or monthly?
 13 A Not at this time.
 14 Q Do you know how many pages are on the Web
 15 site?
 16 A I believe it's — including photographs, I
 17 don't know. Somewhere around ten. I'm guessing.
 18 Q Is it an interactive Web site?
 19 A No.
 20 Q Is there information on the Web site about
 21 making donations to the Foundation?
 22 A There is now again. We removed that by
 23 virtue of agreement between the counsel.
 24 Q How long has this Web site been up and
 25 running?

ANIMAS REPORTING SERVICE

1 A Back up in its current form, I'm guessing, a
2 couple months.
3 Q You took 20 or 30 seconds to come to that
4 answer. Are you not quite sure about how long it's been up
5 and running?
6 A Not exactly. I believe it's around a couple
7 of months.
8 Q Have you ever conducted a media tour of any
9 part of the right-of-way?
10 MR. MICKLEWRIGHT: Objection. Relevance.
11 If you can, answer the question.
12 A Have I taken a media tour of the
13 right-of-way?
14 Q (By Mr. Allen) Have you invited, for
15 example, railroad publication writers to come and visit you
16 and escorted them up and down the line?
17 A We had a number of railroad people out
18 there. We had a commercial video production company out
19 there. Spent the entire day. And he was so excited by
20 what he saw, he even hopped off his camera and helped us
21 work. He made a commercial of all the tourist railroads in
22 Colorado and some new footage of the old Denver Rio Grande.
23 It's a rebirth of the old name "Rio Grande." It was
24 commercially marketed worldwide.
25 Q Was he working for you?

ANIMAS REPORTING SERVICE

1 is.
2 Q Where is he?
3 A Back east somewhere. I've got a video from
4 him.
5 Q Can you name any others with whom you have
6 had communication, other railway media persons?
7 A I can't pull them off the top of my head at
8 this moment. There have been a number of people out from
9 different magazines. Jason Midyette from the Colorado
10 Timetable.
11 Q M-I-D —
12 A Yes. M-I-D-Y-E-T-T-E. Jason. Mark Hunter,
13 freelance writer, "Denver Post." A gentleman from "Trains
14 Magazine," whose name escapes me at the moment.
15 Q What either metro, daily, financial section
16 newspapers or regional business newspapers would you say
17 are relevant or germane to your market?
18 MR. MICKLEWRIGHT: Objection to foundation.
19 Market for what?
20 MR. ALLEN: Well, for whatever. For
21 soliciting donations, obtaining grants.
22 MR. MICKLEWRIGHT: Fund-raising?
23 Q (By Mr. Allen) I would assume the "Denver
24 Post" and "Rocky Mountain News" are both of consequence of
25 how you project information about your foundation. Is that

ANIMAS REPORTING SERVICE

1 A No. Railroad Productions, I believe, the
2 name was.
3 Q How many media people would you estimate you
4 personally have escorted up and down the line?
5 MR. MICKLEWRIGHT: Objection. Relevance.
6 A Oh, probably 25.
7 Q (By Mr. Allen) How many of them have been
8 concerned about this litigation?
9 MR. MICKLEWRIGHT: Objection. Calls for
10 speculation. State of mind of others.
11 A I have no idea.
12 Q (By Mr. Allen) How much — have any of them
13 said to you, "We're worried about this litigation"?
14 A Most of them say it's very unfortunate.
15 Most of them feel that it is absolutely an appalling
16 situation, very much unwarranted.
17 Q Can you give me the name of some of these
18 people?
19 A That have been on the line?
20 Q Yes. And have made remarks to you that the
21 litigation is unwarranted.
22 A Well, the gentleman from Railroad — Railway
23 Publications. I think it was Les Jarrett.
24 Q Say again.
25 A Les Jarrett. J-A-R-R-E-T-T, I believe it

ANIMAS REPORTING SERVICE

1 a fair statement?
2 A I don't know how vital the "Denver Post"
3 would be. I mean, it obviously reaches a number of people
4 within the state of Colorado. We have been in there in the
5 past. We are going to be in there again. We are listed in
6 "The Colorado Timetable," which goes out nationwide.
7 Q There is a publication called "Four Corners
8 Business Journal." Is that correct?
9 A In Durango, yes.
10 Q Are you acquainted with them?
11 A Yes.
12 Q Who are the beat writers or who are the
13 people who would normally have responsibility for covering
14 your enterprise on that publication?
15 A I don't remember the name.
16 Q Do you know what beat writer or what persons
17 on the "Denver Post" financial section would regularly
18 cover western slope business activity such as yours?
19 A No. Do you?
20 Q As a matter of fact, I do, but I'm not being
21 deposed.
22 A That's good. I'm glad, George.
23 Q Do you know what beat writers or people
24 would normally have the responsibility on the business
25 section of the "Rocky Mountain News" to cover activity such

ANIMAS REPORTING SERVICE

1 as yours?

2 MR. MICKLEWRIGHT: Objection to relevance.

3 MR. ALLEN: I'm trying to get out, Ray, why
4 it is that they're not having success in coming up with
5 enough money to operate a railroad.

6 MR. MICKLEWRIGHT: Why don't you just ask
7 him that?

8 MR. ALLEN: Well, I'm trying to nail down
9 the details and what I got was a conclusory statement that
10 this lawsuit, which you've routinely characterized as
11 trivial, has effectively put them out of business. And
12 what I'm driving at is, I think there's a lot of other
13 reasons why they're not getting money and a lot of it has
14 to do with not having a competent structured public
15 information forum or a competent structure by the executive
16 officer to deal with communication with the public and not
17 this lawsuit.

18 I mean, most of the public doesn't go into 1929
19 Stout Street every day to see what's going on in the
20 Federal Court, but they do read newspapers every day.

21 MR. MICKLEWRIGHT: My understanding is that
22 the Plaintiff's claim in this lawsuit is that its 1972
23 residential zoning is applicable to the former Denver & Rio
24 Grande Western Railroad right-of-way in that part of the
25 city of Creede known as South Creede, and I don't see what

ANIMAS REPORTING SERVICE

1 there is a preemption defense or a preclusion defense that
2 you've raised. You've said we're not subject to zoning
3 because we're a railroad.

4 MR. MICKLEWRIGHT: No, that is not what I
5 said. You mischaracterized not only the law, but you
6 mischaracterized the facts. I have said that, and I
7 maintain that, it is absolutely true that the city of
8 Creede's zoning ordinances can regulate the railroad to the
9 extent they do not usurp federal law. Okay. That's clear.

10 MR. ALLEN: Okay. What I want to get at is
11 whether or not there really is a good faith basis to
12 believe that this entity which your client has described as
13 being financially distressed, and distressed because of
14 this litigation, is ever going to be able to carry out
15 common carrier freight interstate rail service.

16 He said in his last testimony in your office that he
17 did not think that there was any realistic chance that that
18 would happen before Memorial Day 2002. What I'm trying to
19 get at is whether there is any reasonable basis to believe,
20 for whatever reason why, whether it's this lawsuit, whether
21 it's just that it was a wild and crazy idea that wouldn't
22 work or whatever, whether there's any reasonable basis to
23 believe that at any time that anybody can predict or
24 foresee anybody is going to have a locomotive hooked up to
25 freight cars hauling freight for interstate commerce.

ANIMAS REPORTING SERVICE

1 these questions have to do with whether or not Creede's
2 zoning ordinances are applicable. That's my objection as
3 to relevance.

4 MR. ALLEN: You persuaded Judge Babcock to
5 issue an order saying that it's federal jurisdiction based
6 on the anticipated defense that because this is an
7 operating railroad, that it's subject to or arguably
8 subject to the exclusive, maybe even preemptive,
9 jurisdiction of the Surface Transportation Board.

10 Therefore, whether or not this is or is not a
11 railroad seems to us, at least since you raised that
12 defense, as being at the very core of the litigation. And
13 I think if you look at Judge Babcock's order denying remand
14 to the state court and finding federal jurisdiction, Judge
15 Babcock thinks that whether or not this is an operating
16 railroad is at the very core of this litigation. I don't
17 know. I can't read his mind, but since he said, "No, there
18 is a federal question here based on an assumed defense that
19 this is a railroad and that railroads are subject to STB
20 jurisdiction," and that is an inherently federal question,
21 then it seems to me that when all you see driving through
22 Creede are some tracks that haven't had a train on them in
23 a couple of decades, that questions as to when, whether and
24 under what circumstances, if any, there ever might be an
25 operating train are directly relevant to whether or not

ANIMAS REPORTING SERVICE

1 MR. MICKLEWRIGHT: That's not the issue in
2 the lawsuit. The issue is, will the city of Creede be able
3 to zone those activities? And the issue is, to the extent
4 that the city of Creede will be -- the city of Creede will
5 be entitled to zone railroad activities of my client to the
6 extent that they are not preempted by federal law. So
7 imagine a railroad --

8 MR. ALLEN: The preemptive law depends on
9 operating a freight -- carriage of freight. That's where
10 your preemption comes from. It's your assertion that there
11 is a preemption because this is an STB function. The only
12 STB function under 49 USC Section 101 -- 49 USC Section
13 10101 provides that if you're engaged in interstate common
14 carriage of freight by rail, then you're subject to the
15 exclusive jurisdiction of the STB under certain
16 circumstances. Then there is some decision of law to the
17 effect that some non-railroad activity on the railroad
18 right-of-way may be subject to some local jurisdiction,
19 applications of police policies.

20 What I've been trying to get at in the face of two
21 fairly stark facts, is: One, no trains are operating; and,
22 two, your client has testified that when you put it
23 altogether, there's financial distress, which he attributes
24 to this lawsuit. Well, whether it's attributable to this
25 lawsuit or otherwise, it seems to me that financial

ANIMAS REPORTING SERVICE

1 distress to the point of not being able to carry freight is
2 of tremendous relevance as to whether or not your defense
3 is really applicable, which is why I'm really asking these
4 questions.

5 MR. MICKLEWRIGHT: Well, my defense is —
6 our defense is that if railroad activity takes place, the
7 city of Creede is entitled to zone to the extent that its
8 zoning laws run up against federal laws which preempt the
9 city's zoning ordinances. Okay. Otherwise, this issue is
10 just an exercise in intellectual curiosity. But what I
11 think it is, and what I've indicated to my client, and
12 that's why I've instructed him not to answer, is that your
13 client failed within 60 days to file an objection to the
14 acceptance of the Offer of Financial Assistance and is now
15 trying to come in through the back door and ask a whole
16 bunch of questions as to whether or not the Offer of
17 Financial Assistance is viable. I'm not going to let you
18 do that.

19 MR. ALLEN: Okay. Part of the Offer of
20 Financial Assistance is that this guy is going to write a
21 check for \$400,000. He just testified he's not going to
22 write a check for \$400,000.

23 MR. MICKLEWRIGHT: I think that
24 mischaracterizes the evidence.

25 Q (By Mr. Allen) Are you going to write a

ANIMAS REPORTING SERVICE

1 it properly presented. I'm not going to try to do it in a
2 telephone call.

3 MR. MICKLEWRIGHT: I recall him sort of
4 chewing me out because of the last time that I instructed
5 the witness not to answer and I didn't take action
6 immediately.

7 MR. ALLEN: Well, he told you you've got ten
8 days to file your motion. I don't think you can possibly
9 file a proper motion for a Protective Order based on
10 relevancy, which is essentially what you're saying.

11 My position is, whether it's relevant or not, it's a
12 proper inquiry because it might lead to the discovery of
13 admissible evidence; and, therefore, we're entitled to
14 inquire into it, but I also think it's darned relevant.

15 I take it we're at an impasse. Is that fair to say?
16 If you want to make an offer of proof of what you will
17 provide us, I will welcome that and an opportunity to
18 inquire into it, but what we have right now is a statement
19 that he thinks by September 1st he can provide the
20 Foundation with \$400,000. And you have directed him not to
21 say how he's going to do that.

22 MR. MICKLEWRIGHT: I think he has indicated
23 in his Offer of Financial Assistance his financial
24 situation as of the day he was required to submit it.

25 MR. ALLEN: And you are refusing to allow us

ANIMAS REPORTING SERVICE

1 check for \$400,000, Mr. Shank?

2 A Your question to me before was, "Can you
3 write that check today?" And I said, "No, I cannot today."

4 Q Can you write — do you believe it is
5 reasonably likely that you can write, the Foundation — a
6 check will clear the bank for \$400,000 between now and
7 September 1, 2001?

8 A I have good reason to believe I could.

9 Q From what sources?

10 MR. MICKLEWRIGHT: I'll object.

11 MR. ALLEN: Well, now, we are —

12 MR. MICKLEWRIGHT: I'll instruct him to not
13 answer the question. First, I don't think it's relevant.
14 Second of all, I think it goes to the issue of challenging
15 the Offer of Financial Assistance. And, third, he answered
16 your question, and I think that's all you're entitled to
17 ask. Now, we can call the magistrate, and let's cut to the
18 chase.

19 MR. ALLEN: If we are going to have this
20 issue before the magistrate as to whether or not we're
21 entitled to inquire into his personal financial capacity,
22 we're going to have it before the magistrate based upon the
23 full record which will include the record. And I
24 believe — and I know he said, "Call me up." But, to us,
25 this is an issue of vital importance and I'm going to have

ANIMAS REPORTING SERVICE

1 any inquiry into whether or not that continues to be a
2 valid representation of approximately the scale of what he
3 has available today?

4 MR. MICKLEWRIGHT: As I understand the Offer
5 of Financial Assistance, if you wish to challenge it, then
6 you're going to have to come up with some evidence on your
7 own to reopen the case, but, otherwise, your client has
8 missed its appellate deadline, and this case is not the
9 appropriate forum or jurisdiction. It's the Court of
10 Appeals.

11 Q (By Mr. Allen) Mr. Shank, I'll try to come
12 at this another way. There have been, over the past
13 several years as a matter of public record in the court of
14 La Plata County, several lawsuits filed against you which I
15 think would fairly be characterized as collection cases,
16 things on your Visa account, things like that, which would
17 cause one to think, absent being furnished some other
18 evidence, that whatever your financial condition may have
19 been in March of '99, that you may not have had the means
20 either before that date or subsequent to that date to make
21 Visa payments of 10 or \$15,000 and so forth.

22 Can you provide us with any testimony or any
23 documents to counteract the inference I have drawn, from
24 looking at copies of those pleadings, that there was some
25 inability on your part to meet those obligations?

ANIMAS REPORTING SERVICE

1 MR. MICKLEWRIGHT: I'll instruct the witness
2 not to answer that question. And would you mark that
3 question and my objection?

4 THE REPORTER: (Nodding head.)

5 MR. ALLEN: Ray, is there anything you can
6 give us that will give us any comfort whatsoever as to Mr.
7 Shank's resources or means of performing on the pledge that
8 is the backing for the Offer of Financial Assistance?

9 MR. MICKLEWRIGHT: Let's go off the record.

10 (Discussion off record.)

11 MR. ALLEN: We've been off the record for
12 seven minutes and forty-five seconds. We're back on the
13 record.

14 Q (By Mr. Allen) Just to summarize, the
15 Foundation could not draw on funds right now that it has in
16 liquid form, bank accounts, negotiable securities, etc., to
17 make a payment to the Union Pacific? What is the amount
18 due in September?

19 A It's 137,308.

20 Q And the Foundation does not right now today,
21 August 3rd, have that amount in liquid funds. That's a
22 fair statement. Is it not?

23 A That's a fair statement.

24 Q Other than your pledge that we have been
25 talking about made back in 1999, the Foundation does not

ANIMAS REPORTING SERVICE

1 Q Now, this describes what the Foundation had
2 as of November 30, 1998. Am I correct in that regard?

3 A Yes, this was. You're mostly correct.

4 There was a few items on here which were pledged, committed
5 for donation, which have yet to take place.

6 Q Maybe rather than my trying to go through it
7 line item by line item, you can identify what those are
8 right now, which items on here you expect to get or did
9 expect to get that have not yet occurred.

10 A 1881, RGS Narrow Gauge Passenger Coach.

11 Sorry. Coach 252 was acquired, but not acquired by the
12 Foundation.

13 Q Who acquired it?

14 A I did. It was supposed to be a donation to
15 the Foundation, but at the last minute, the people decided
16 they wanted a significant amount of money for the car. I
17 wound up purchasing it myself.

18 Q What do you mean by "a significant amount of
19 money"? What is the dollar amount?

20 A Twelve-five.

21 Q Twelve thousand five hundred dollars?

22 A Yes. Significant in terms of typical
23 railroad car bodies. That was a fairly large amount.

24 Q Okay.

25 A 1880 D&RG Narrow Gauge Coach 274 and Pullman

ANIMAS REPORTING SERVICE

1 have any other contractual undertakings from any other
2 sources who have contractually obligated themselves to pay
3 you money between now and then, to pay you money. That is
4 also a fair statement. Is it not?

5 A Contractual sources to pay me or the
6 Foundation?

7 Q The Foundation. In other words, there isn't
8 somebody at, say, the Ford Foundation in New York City who
9 has written you a letter and said, "We have agreed that we
10 will wire transfer \$137,000 to you on or before Labor Day
11 so that you can make that payment"? There is no such
12 undertaking out there at this time that you have documented
13 and that you believe you could enforce against a donor or
14 contributor or purchaser of something or whatever?

15 A Not at this time.

16 MR. ALLEN: Let's take a break.

17 (Lunch recess taken.)

18 MR. ALLEN: Okay. It's 14 minutes after
19 1:00. We've been on a break since about 11:45 this
20 morning.

21 Q (By Mr. Allen) I want to direct your
22 attention to Plaintiff's Exhibit 1, the page that is marked
23 "8/15" at the top right corner. Do you have that in front
24 of you?

25 A I'm getting there.

ANIMAS REPORTING SERVICE

1 Car 251 are still pledged that are not consummated as of
2 this moment.

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

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

12 Q Who's "they"?

13 A Mountain Trails Youth Camp.

14 Q Okay. Where is it located?

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

17 Q Going down to "railroad memorabilia and
18 artifacts."

19 A Yes.

20 Q Lantern collection.

21 A Uh-huh.

22 Q Is that actually owned by the Foundation?

23 A It is.

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

ANIMAS REPORTING SERVICE

1 A Yes.
 2 Q "Historic paper collection"?
 3 A It is.
 4 Q "Associated artifacts, switch stands, rail,
 5 spikes, car seals," etc. Is that owned by the Foundation?
 6 A It is.
 7 Q Would this \$65,000 value be, on those
 8 aggregate items, memorabilia and artifacts, be a valid
 9 number running pretty much continuously from 1998 when this
 10 was done through '99 or 2000 when you acquired the OFA
 11 rights?
 12 A Yes. That would be a minimum value.
 13 Q Would it be about the same value today?
 14 A Certainly. Every bit of that.
 15 Q Tell me; does the Foundation have things
 16 like this insured? Do you carry insurance on it?
 17 A It's carried under insurance and in its
 18 present location by the donor, by donors. The Foundation,
 19 at this time, is not housing this collection on a
 20 Foundation site.
 21 Q Are these in different donors' locales?
 22 A They are.
 23 Q So far as you know, have the donors actually
 24 transferred these things to the Foundation in terms of
 25 legal title?

ANIMAS REPORTING SERVICE

1 top of my copy.
 2 MR. MICKLEWRIGHT: Well, I don't know how
 3 you obtained it, but my assumption is -- if you obtained
 4 it, then my assumption is, unless it's subject to the
 5 confidentiality agreement, it's otherwise public record,
 6 and I will instruct my client not to answer any questions
 7 regarding the Offer of Financial Assistance other than
 8 what's provided in the document here.
 9 Q (By Mr. Allen) Okay. Let's move to the
 10 "model railroad collection." I see three line items,
 11 "Lionel Train collection, American Flyer collection and SA3
 12 N scale and miscellaneous" totaling \$152,000. Were those
 13 items, in November of '98, in the physical possession of
 14 the Foundation?
 15 A Not in the physical possession, but readily
 16 available.
 17 Q Have they been transferred to the Foundation
 18 in terms of legal title to them?
 19 A Verbalized, but not in a formal document.
 20 Q Who is the donor or the holder of those
 21 items or holders, plural; if it's more than one?
 22 A My father, my brother, and myself.
 23 Q Do you know whether any of those three
 24 individuals, your father, brother, yourself, have taken tax
 25 deductions for donations to the Foundation for these items?

ANIMAS REPORTING SERVICE

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

ANIMAS REPORTING SERVICE

1 A We have not.
 2 Q Do you know whether or not the donors of the
 3 railroad memorabilia and artifacts that are listed in the
 4 heading above have taken charitable deductions for
 5 donations of these items to the Foundation?
 6 MR. MICKLEWRIGHT: Objection to the form.
 7 If you can, answer the question.
 8 A They have not.
 9 Q (By Mr. Allen) Do you know whether there
 10 have been any appraisals on any of these items to support
 11 these values?
 12 A A lot of those values can be substantiated,
 13 validated by publications that are readily available.
 14 Q In other words, there are catalogs and
 15 circulars that go around the railroad community that would
 16 have comparable things for sale so you can say if you have
 17 a Lionel Train collection of X number of cars, engines,
 18 etc., that you could look in the catalog or what's
 19 available now and effectively price your stuff based on the
 20 prevailing prices?
 21 A Exactly correct.
 22 Q This land in Silverton, Colorado, donated
 23 for cash conversion. Does the Foundation own that or was
 24 it converted to cash?
 25 A The Foundation currently owns it. The

ANIMAS REPORTING SERVICE

1 property is currently listed for sale.
 2 Q What kind of property is that? Is it
 3 developed, undeveloped?
 4 A Undeveloped land. And the dollar figure
 5 reflected there is based on a bona fide appraisal.
 6 Q Okay. Now, the Foundation made a payment to
 7 Union Pacific in closing this transaction of some \$350,000
 8 or thereabouts?
 9 A It was in two separate payments —
 10 Q Well —
 11 A — totaling 350.
 12 Q When I went through the documents this
 13 morning, I saw a letter in which — and I can't recall if
 14 it was a letter from Mr. McFarland to Union Pacific or from
 15 somebody from Union Pacific back to you or him —
 16 MR. MICKLEWRIGHT: Counsel, can I cut you
 17 off? Mr. Burkett is not subject to the confidentiality
 18 agreement, so if we're going to discuss documents subject
 19 to the confidentiality agreement, I am going to ask he be
 20 excused during that period of time. She's a party.
 21 MR. ALLEN: Go ahead.
 22 (Mr. Burkett leaves deposition.)
 23 MR. ALLEN: Let me ask you this, BJ, because
 24 I don't practice municipal law. Do you have any disclosure
 25 obligations that you know of with regard to confidential

ANIMAS REPORTING SERVICE

1 A It was an earnest deposit of a \$100,000 that
 2 was paid.
 3 Q Well, sometime prior to May of 2000,
 4 correct?
 5 A It seems like it was August of '99 or
 6 October of '99 somewhere.
 7 Q Then what? Another payment of about
 8 250,000?
 9 A Correct.
 10 Q What was the source of those payments?
 11 Where did that money come from?
 12 A The initial \$100,000 deposit came from me.
 13 Q Those were your own funds?
 14 A Uh-huh.
 15 Q Did you loan it to the Foundation?
 16 A Yes.
 17 Q Is there a note from the Foundation back to
 18 you for that money?
 19 A There is.
 20 Q And the other 250,000, what was the source
 21 of that money?
 22 A Outside donation.
 23 Q Who was the donor?
 24 MR. MICKLEWRIGHT: It's subject to
 25 confidentiality, so if you want to —

ANIMAS REPORTING SERVICE

1 information that you would be obliged to disclose either to
 2 your trustees or anyone that it would be more comfortable
 3 for you if you're out of the room, too?
 4 MAYOR MYERS: Let me think for a
 5 minute.
 6 MR. ALLEN: Okay. I just can't advise you
 7 on that. I'm special counsel for the town. I don't know.
 8 MAYOR MYERS: Obligated? Not that I would
 9 have to disclose, but I think I'd be more comfortable if I
 10 weren't a party to it.
 11 MR. ALLEN: Okay. Great. Why don't you
 12 step out, too?
 13 MAYOR MYERS: Okay.
 14 (Mayor Myers leaves deposition.)
 15 MR. ALLEN: Okay. Now, the record should
 16 reflect that Mr. Burkett and Mayor Myers are no longer in
 17 the room.
 18 Q (By Mr. Allen) I believe my question went
 19 to the payments that were made to Union Pacific which would
 20 have been — what? Roughly May of 2000?
 21 A No. The first payment that went to Union
 22 Pacific was in —
 23 Q That's right. You paid them earlier than
 24 that. They were, in effect, your earnest money on the
 25 purchase?

ANIMAS REPORTING SERVICE

1 A Sam Furukawa.
 2 Q (By Mr. Allen) Who is he? Someone here in
 3 Durango, or who is Mr. Furukawa?
 4 A He is a Japanese businessman that loves
 5 railroads.
 6 Q Is he in the United States?
 7 A Part of the time.
 8 Q Japanese citizen, I take it?
 9 A He is.
 10 Q Has he made any further pledges to you or
 11 communicated anything further to you about money he might
 12 donate?
 13 A He has.
 14 Q Please describe the nature of what he may be
 15 contributing.
 16 A This is all hypothetical because it's all
 17 based on conversations over the telephone, but he has made
 18 a verbal pledge of a million dollars. Whether or not he'll
 19 come through with that, I don't know.
 20 Q Has he said when he would give you that
 21 money?
 22 A No.
 23 Q By "you," I mean the Foundation.
 24 A Not at this time.
 25 Q If we wanted to contact him, how would we do

ANIMAS REPORTING SERVICE

1 that?

2 MR. MICKLEWRIGHT: Subject to the
3 confidentiality order.

4 A See, I have a confidentiality agreement with
5 him. It's to nondisclose.

6 MR. ALLEN: So we won't contact him without
7 filing a motion with the court saying there is an
8 individual whom we wish to contact -- and I guess we'll
9 seal the document that identifies him and then see whether
10 or not Judge Shaffer or Judge Babcock will let us do it.

11 Now, subject to that agreement -- and this will need
12 to be separately transcribed or blocked out in some way and
13 sealed.

14 (Following record is confidential:)

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ANIMAS REPORTING SERVICE

1 Q (By Mr. Allen) Okay. If I wanted to
 2 contact him, how would I do that?
 3 A Sam is Microsoft of Tokyo. He is on the
 4 Board of Directors of Microsoft.
 5 Q On the Board of Directors of Microsoft
 6 Corporation, the corporation that is listed on the —
 7 A Yes.
 8 Q — on the NASDAQ?
 9 A Yes. Bill Gates, Paul Allen, Sam.
 10 Q How recently have you talked with him or had
 11 other communications, written or oral, whatever, with him
 12 about such a donation?
 13 MR. MICKLEWRIGHT: Objection to relevance.
 14 If you can, answer the question.
 15 A I haven't spoken to Sam in some time, but
 16 I'll be seeing him this fall.
 17 Q (By Mr. Allen) By "some time," are we
 18 talking about a couple days, a couple weeks, months?
 19 A Months. He is, to say the absolutely very
 20 least, a busy man.
 21 Q I presume one could contact Microsoft in
 22 Seattle and they would know how to find him?
 23 A I would think so.
 24 Q When you communicate with him, is he
 25 generally in the states or in Japan?

ANIMAS REPORTING SERVICE

1 A I e-mail him.
 2 Q Do you know his e-mail address from memory?
 3 A No.
 4 Q Is it an e-mail address that ends at
 5 Microsoft.com?
 6 A It used to be. It's not anymore. It's long
 7 and different.
 8 (End of sealed, confidential record.)
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ANIMAS REPORTING SERVICE

1 MR. ALLEN: Off the record a moment.
 2 (Discussion off record.)
 3 Q (By Mr. Allen) You've identified Mr.
 4 Furukawa. I'd like you to describe anyone or any other
 5 entity with whom you have had communication over the —
 6 let's say since January 1, 2001, this year, relative to
 7 potential gifts, donations or other contributions to the
 8 Foundation of a substantial character. I'm not talking
 9 about people who, you know, buy a railroad tie for \$90.
 10 I'm talking about major money. Let's say \$10,000 and
 11 above.
 12 Have there been any — other than what you referred
 13 to with Mr. Furukawa, have there been, during calendar
 14 2001, any other communications with any other persons or
 15 entities anywhere relative to contributions of \$10,000 or
 16 more this year?
 17 MR. MICKLEWRIGHT: Objection.
 18 A Sorry. I talk to people all the time. Now,
 19 whether or not we can decipher who's real and who isn't, we
 20 don't know until we get into further dialogue and try to
 21 firm something up.
 22 Q (By Mr. Allen) Has anyone written you a
 23 document, letter, e-mail, memo, this year, calendar 2001,
 24 indicating a possibility of a contribution from that person
 25 or entity or someone they represent of \$10,000 or more?

ANIMAS REPORTING SERVICE

1 MR. ALLEN: No. I'm saying I would think
 2 his state of mind would be wonderfully concentrated on
 3 sources of money to come up with the dough to get this
 4 thing up and rolling.
 5 MR. MICKLEWRIGHT: Is that the question? If
 6 the question is, "Are you concerned about making
 7 payment" —
 8 MR. ALLEN: Okay. I will adopt that.
 9 Q (By Mr. Allen) Are you concerned about
 10 making payment?
 11 A Not at this moment.
 12 Q Do you have identified sources from which
 13 you will be able to make payments?
 14 A Potentially.
 15 Q What are they?
 16 MR. MICKLEWRIGHT: Objection. I'll instruct
 17 you not to answer that question.
 18 MR. ALLEN: We just had a confidentiality
 19 agreement. I can't even talk to these people without
 20 asking the permission of the court to do so.
 21 MR. MICKLEWRIGHT: I don't want you talking
 22 to these people.
 23 MR. ALLEN: Fine. I'll make that pitch to
 24 the judge.
 25 MR. MICKLEWRIGHT: Let me say this again.

ANIMAS REPORTING SERVICE

1 MR. MICKLEWRIGHT: Objection. Asked and
 2 answered and relevance. But if you can, answer the
 3 question.
 4 A I don't have that information at my
 5 fingertips.
 6 Q (By Mr. Allen) I would think if you're
 7 sitting here having to either make a payment to Union
 8 Pacific of \$137,000 or go back to them, once again, and
 9 say, "I can't pay it, you need to roll it," and needing
 10 significant amounts of money to lay track, rehabilitate
 11 track, buy equipment, all of that, hire people, that, in
 12 Dr. Johnson's terms, your mind must be wonderfully
 13 concentrated on who might be coming up with that money for
 14 you. Isn't that fair to say?
 15 MR. MICKLEWRIGHT: Objection.
 16 Argumentative.
 17 MR. ALLEN: I don't think it's
 18 argumentative.
 19 MR. MICKLEWRIGHT: You're asking him to put
 20 himself —
 21 MR. ALLEN: I'm asking him about his own
 22 state of mind. He can testify to his own state of mind.
 23 MR. MICKLEWRIGHT: No. You're saying, if it
 24 was your state of mind, this is what you'd be concerned
 25 about?

ANIMAS REPORTING SERVICE

1 This appears to be an attack on the Offer of Financial
 2 Assistance. Even if you were able to make an attack on the
 3 Offer of Financial Assistance, as you seem to be inclined
 4 to do in the pending litigation, it seems to exceed the
 5 scope of the court's jurisdiction. You need to file a
 6 petition with the STB. You can't ask this judge to
 7 exercise jurisdiction when your client has lost its appeal
 8 rights from the Offer of Financial Assistance, and we're
 9 not going to assist them in this litigation in trying to
 10 conduct discovery to determine whether or not there's some
 11 new evidence by which they can open an attack on the Offer
 12 of Financial Assistance, so —
 13 MR. ALLEN: I'd like to move for a summary
 14 judgment in this case that Creede's zoning applies because
 15 there is no competent evidence within the — no competent
 16 evidence within the meaning of the Celotex, C-E-L-O-T-E-X,
 17 Case to support an inference that there will ever be
 18 railroad service going past Section 36. And that means
 19 that I'm entitled to find out whether or not there are
 20 financial — the record as it sits right now, Ray, is,
 21 there is no rail service, and there is no evidence of any
 22 ability to create rail service.
 23 That is the record as it is right now, and that is
 24 the nature of the question. I just want to close the door.
 25 I want to find out if there is a source of substantial

ANIMAS REPORTING SERVICE

1 revenue in order to get from where they are right now,
2 which is basically moribund to actually operating freight
3 rail service within the city of Creede.

4 MR. MICKLEWRIGHT: I don't think, given the
5 scope of this litigation, and the fact that your client has
6 lost its appeal rights to the STB —

7 MR. ALLEN: I'm not going to debate the
8 appeal rights to the STB. I wasn't here then. As far as I
9 know, Creede was not a party. Nobody is trying to reopen
10 what the STB did, other than through Judge Babcock. Okay.
11 It's solely in this litigation. I have no intention of
12 filing a petition to reopen. This is not an expedition.
13 You guys raised the STB. We didn't. We had a nice simple
14 Mineral County zoning case, and that's all we had.

15 We just wanted to be sure that nobody was going to
16 start putting commercial development on Section 36 in
17 Creede. That's all we wanted to do. That there weren't
18 going to be any bed and breakfasts or motels or anything
19 else built in order to generate a revenue stream off of
20 this couple of acres of ground. That's what our lawsuit
21 was about. You're the guys who turned it into something
22 that you wanted sent to the STB. We didn't.

23 MR. MICKLEWRIGHT: No, that's not correct.
24 Let me just make my record. In the scheduling order that
25 was submitted to the court, which I think controls the

ANIMAS REPORTING SERVICE

1 somebody out there who's going to pony up a million dollars
2 so we can get operating, and, if so, who it is.

3 MR. MICKLEWRIGHT: I don't think he has to
4 answer these questions, and I'm going to instruct him not
5 to.

6 MR. ALLEN: I could at least understand the
7 position that I wouldn't go into his personal assets, even
8 though I think I am entitled to since he's a guarantor of
9 the Offer of Financial Assistance. And now you're saying
10 that we can't find out what the Foundation has either.

11 MR. MICKLEWRIGHT: No. What you're asking
12 is what the Foundation might at some point in time get. I
13 have allowed you to ask questions about how the Foundation
14 arrived at the assets that it has disclosed to the public,
15 but I'm not going to let you have access, at this point in
16 time, without a court order that says you can find out any
17 place where there might be a source of revenue so you can
18 interfere with it. I'm not going to let that happen.

19 MR. ALLEN: I have no intention of that.

20 MR. MICKLEWRIGHT: I don't mean you
21 personally. This is a bitter piece of litigation.

22 MR. ALLEN: No, it's not bitter. Shoot.

23 MR. MICKLEWRIGHT: Well, as an outsider, I
24 read those newspaper articles and the letters in my
25 client's files that you've had access to, and they sure

ANIMAS REPORTING SERVICE

1 litigation with respect to the scope of the issues, one of
2 the things that you have asserted is that — and let me
3 just make sure I get the language absolutely correct.

4 Plaintiff claims its 1972 residential zoning is
5 applicable to all of the former Denver & Rio Grande Western
6 Railroad right-of-way in that part of the city of Creede
7 known as South Creede, except for the area occupied by the
8 railroad tracks themselves and a side clearance area
9 extending 12.5 feet to either sides of the center line of
10 the tracks; thus, Creede's claim is that except for a
11 25-foot wide strip on which the tracks are centered, all of
12 the Denver Rio Grande Western Railroad right-of-way in
13 South Creede is subject to Creede's residential zoning.
14 That's the issue that you put in your complaint.

15 MR. ALLEN: Exactly. That's my point. And
16 if I can establish that there is never going to be rail
17 service, then I can absolutely get a summary judgment on
18 that issue. There isn't even anything for the STB to
19 determine. So, you're the guys who said don't remand this
20 case to the state court because there are STB issues in it.

21 MR. MICKLEWRIGHT: Governing that has to
22 be — what you are asserting is a direct attack on the
23 Offer of Financial Assistance.

24 MR. ALLEN: No, it isn't, but I don't want
25 to debate that. I just want to find out if there is

ANIMAS REPORTING SERVICE

1 sound to me that it's bitter and personal.

2 MR. ALLEN: I don't read the newspapers.

3 MR. MICKLEWRIGHT: I understand that, but
4 I'm saying that with respect to the people from the
5 community, it is an emotional issue, not a rational issue.
6 We're fighting about something —

7 MR. ALLEN: I'm trying to get at a revenue
8 stream that looks like it might reasonably give him enough
9 money, him, the Foundation, to get operational. And, first
10 of all, what I want to touch on is donors or prospective
11 donors.

12 MR. MICKLEWRIGHT: Okay. I'm not going to
13 let you inquire into prospective donors. I'm not.

14 MR. ALLEN: You understand that if you want
15 to file something in this proceeding with the STB that
16 says, "Oh, we got donors," I'm going to ask for preclusion
17 on the grounds that you shielded it from inquiry?

18 MR. MICKLEWRIGHT: I don't think this has
19 anything to do with donors or financial reports. This case
20 has everything to do with whether or not, if there were a
21 operational railroad, would the city of Creede's
22 residential zoning ordinances preempt the federal laws
23 regarding the operation of the railroad.

24 MR. ALLEN: You can claim there is an
25 operational railroad based on having the OFA rights,

ANIMAS REPORTING SERVICE

1 regardless of whether you're driving trains up and down?
 2 MR. MICKLEWRIGHT: No. The issue is, is the
 3 zoning ordinance of -- the residential zoning ordinance for
 4 the city of Creede applicable to the railroad right-of-way.
 5 That seems to me to be something that the STB can answer
 6 without any hesitation and is in a far better position to
 7 answer that question than the judge, although I think the
 8 judge could easily answer the question, but I think it's
 9 more appropriate under the doctrine of primary jurisdiction
 10 for the STB to make that determination.
 11 MR. ALLEN: But if our factual record is
 12 that there hasn't been a train on it since 1985 and within
 13 the city of Creede, there hasn't been a train on it since
 14 1972 and there is no financial ability to put a train on it
 15 hauling freight, then I think I'm entitled to a summary
 16 judgment in this litigation.
 17 MR. MICKLEWRIGHT: On what?
 18 MR. ALLEN: That Creede's residential zoning
 19 is applicable to this strip of land. We're talking about
 20 Section 36 land, not used -- land not historically used for
 21 railroad purposes.
 22 MR. MICKLEWRIGHT: Okay.
 23 MR. ALLEN: Okay. And, therefore, I'm
 24 entitled to inquire into whether there is any probability
 25 within the -- you know, what "Celotex" talks about, you

ANIMAS REPORTING SERVICE

1 railroad operation.
 2 MR. MICKLEWRIGHT: Again, I think that goes
 3 to the issue of the Offer of Financial Assistance.
 4 MR. ALLEN: Well, okay, fine.
 5 MR. MICKLEWRIGHT: If my client carries out
 6 his obligations under the Offer of Financial Assistance,
 7 there's going to be a railroad.
 8 MR. ALLEN: Okay. Are you going to assert a
 9 similar position with regard to the people he's talked with
 10 at Union Pacific so I have to keep Burkett and Mayor Myers
 11 out of the room?
 12 MR. MICKLEWRIGHT: Yes.
 13 MR. ALLEN: Let me tell them that's where
 14 I'm going next, so they will understand that they're going
 15 to be cleaning their heels for a while.
 16 (Recess taken.)
 17 MR. ALLEN: Okay. I'm going to ask one
 18 final question for the record so that you have an
 19 opportunity to make your pitch, so I'm sure that I've
 20 exhausted every possibility.
 21 Q (By Mr. Allen) Mr. Shank, at this time, you
 22 cannot or will not identify any person, entity or legal
 23 personality of any kind, corporation, representative, who
 24 or which is a prospect to contribute or give or make
 25 available to the Foundation this year anything having a

ANIMAS REPORTING SERVICE

1 can't defeat summary judgment, Ray, with a conclusory
 2 allegation that somebody is going to give us a million
 3 dollars. You got to come in and say exactly how you're
 4 going to do it.
 5 MR. MICKLEWRIGHT: No matter how you couch
 6 it, what you're talking about is an attack on the Offer of
 7 Financial Assistance.
 8 If you want to bring -- if you want to join in a
 9 Motion for Summary Judgment that says if and when -- well,
 10 it would look something like this: Is the railroad
 11 right-of-way subject to the city of Creede's zoning
 12 ordinances, residential zoning ordinances, or are those
 13 zoning ordinances preempted by federal law? That is a
 14 no-brainer. The answer to that is self-evident.
 15 MR. ALLEN: I don't know the answer to that.
 16 What is the answer?
 17 MR. MICKLEWRIGHT: The answer to that is
 18 that the city of Creede's residential zoning ordinances can
 19 be enforced to the extent that they do not interfere with
 20 the preemption of federal law.
 21 MR. ALLEN: Right. Okay. I agree with
 22 that. Now, what I want to find out is whether or not there
 23 is ever going to be any railroad operation there or whether
 24 or not we can just say globally that Creede's residential
 25 zoning is applicable because there isn't going to be any

ANIMAS REPORTING SERVICE

1 value of \$10,000 or more. Is that correct?
 2 MR. MICKLEWRIGHT: I'm going to
 3 object to that question. I'll instruct my client not to
 4 answer that question.
 5 Q (By Mr. Allen) Okay. Now, moving on, when
 6 we inspected files at your offices in Durango this morning,
 7 those are the only offices of the Foundation?
 8 A Yes.
 9 Q Is that the only place the Foundation has a
 10 physical presence?
 11 A No. The Foundation clearly has a physical
 12 presence on the railroad.
 13 Q Okay. I understand it's got that
 14 right-of-way. Is there anywhere that the Foundation
 15 actually has an improved structure? Are there any
 16 warehouses or buildings or equipment yards or anything of
 17 that nature?
 18 A Well, we do have a significant amount of
 19 equipment located in a number of areas, places. Some has
 20 been donated and yet to be moved, and some is a
 21 work-in-progress.
 22 Q Can you hit the high spots for a couple
 23 minutes and, say, "We got tracks stockpiled here; ties
 24 here;" this locomotive we already talked about down in
 25 Brighton, and etc.?

ANIMAS REPORTING SERVICE

1 A Perhaps it would be appropriate to look at
2 some of the equipment. This equipment, maintenance of way
3 motorcar, is not owned by the Foundation, but it is made
4 available for use, unlimited use.
5 Q Who owns it?
6 A Richard Cutter.
7 Q How much is it worth about?
8 A What's it worth?
9 Q Uh-huh. If I had to go out and buy one
10 tomorrow?
11 A In this condition, probably at least 15,000.
12 Q Okay.
13 A This is a Foundation owned motorcar. It's
14 been restored, fully operational.
15 Q The Foundation owns it?
16 A Yes.
17 Q Where is it located physically?
18 A Currently, it resides at the Cutter
19 residence.
20 Q Is that along the right-of-way?
21 A This is on the Creede Branch right-of-way.
22 MR. ALLEN: Okay. Can we at some point get
23 copies of these?
24 MR. MICKLEWRIGHT: Yes.
25 A This is a rail grinder for grinding inside

ANIMAS REPORTING SERVICE

1 Q Okay. So that piece of equipment is
2 presently located in Durango?
3 A Yes.
4 Q How would one get it over there, put it on a
5 flatbed truck and haul it?
6 A If you'll notice, in this picture, it is on
7 a flatbed truck, and it currently resides on the truck
8 ready for movement.
9 Q Has it ever been up there to Mineral County?
10 A I'm sure it has.
11 Q Has it been up there for use by the
12 Foundation?
13 A Not yet. We're not installing anchors at
14 this time. Flat car. Goes behind the motorcar. Diesel
15 locomotive currently being negotiated for.
16 Q Where is that locomotive?
17 A Gosh.
18 Q Is that the one in Brighton?
19 A No. This is similar to the one in Brighton
20 that we already own.
21 Q Okay. What would you say its worth is?
22 A Twenty-five thousand.
23 Q Is it operational right now?
24 A It is.
25 Q Where is it located?

ANIMAS REPORTING SERVICE

1 surfaces of the rail.
2 Q (By Mr. Allen) Okay. What is its
3 approximate worth in the free market situation?
4 A You know, I don't know what it's worth on
5 the open market.
6 Q About \$10,000?
7 A No.
8 Q Less?
9 A Less.
10 Q Okay.
11 A This is a rail anchor machine. Also a
12 hydraulic platform, fully operational.
13 Q That is what you described in your last
14 deposition as being potentially worth \$90,000, but you got
15 it for a dollar?
16 A No. Not even close. We got it for \$90 and
17 probably worth — purchased new, I would guess it's
18 somewhere between 40 to 60,000.
19 Q So you got it for a nominal payment. Where
20 is it located?
21 A The Foundation didn't purchase it. It was
22 purchased by the Cutters for use by the Foundation. It is
23 at their residence.
24 Q Their residence is in Mineral County?
25 A No. Durango.

ANIMAS REPORTING SERVICE

1 A I'm sorry. We've looked at so many. I'm
2 not sure if this one is in Kansas, Texas, or back east. I
3 believe this is Kansas.
4 MR. ALLEN: Can you hold the photograph up.
5 Doesn't look like eastern US vegetation. Not impossible,
6 but —
7 MR. MICKLEWRIGHT: Just for the record, it's
8 Kansas.
9 A Hey, first choice. Here is some of our
10 surplus switch stands.
11 Q (By Mr. Allen) What are they worth?
12 A Well, depending upon the item. Some of
13 these have great historic value which places a far higher
14 value than simply a stamped steel. This is a cast iron
15 switch stand. Cast on it for hanging the switch lantern on
16 the top. Very old "D&RG RR" cast on it. They carry a much
17 greater value than the newer stamp steel.
18 Q Let's take the generic one without historic
19 value. What are we talking about?
20 A A couple — 300 bucks, 500 bucks.
21 Q One with historic value, a few thousand?
22 A Somewhere in that vicinity.
23 Q Okay.
24 A These are rail drills. These are pneumatic
25 jacks.

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1 Q Give me an aggregate value of everything
2 there.
3 A Oh, drills are about \$2500 a piece.
4 Q You've got — what? Three or four of them
5 there?
6 A I believe that's what we have. These jacks
7 are quite expensive. I'm sorry. I don't know what their
8 exact worth is. I saw two identical units being utilized
9 in the Rio Grande shops in Denver.
10 Q Okay. Ten or twenty thousand for the
11 aggregate?
12 A If that. Yeah. On the aggregate, yes.
13 Q Can you angle that slightly differently?
14 I'm getting a glare.
15 A This is the depot in Creede prior to the
16 removal of what they used to call the parlor. This area
17 has been cleaned out. The depot has been — this is just
18 giving you some progress here.
19 Q Is it the Foundation's position that the
20 Foundation owns the depot in Creede?
21 A They do not. That's owned by Mineral
22 County. We really needn't discuss this on record.
23 Q Okay.
24 A This is how the right-of-way looked prior to
25 cleanup going through Masonic Park. As you can see, there

ANIMAS REPORTING SERVICE

1 A Yes. This is the quote, unquote, event
2 center.
3 Q Okay.
4 A Downtown Creede.
5 Q What I want — I'd like you to skip over
6 things that don't show something that you're either
7 occupying with a building or show some equipment. I
8 mean —
9 A Okay. This has all been cleared. This is a
10 landslide that was cleared. Rock slides were cleared.
11 Equipment that was working on the right-of-way. More
12 landslides. Maintenance vehicle. Auto maintenance vehicle
13 here. Clearing fallen trees. Removing rock. Foundation
14 equipment here or Cutter equipment here as well.
15 Q Okay.
16 A Installation of new ties.
17 Q Okay.
18 A We hadn't gotten into this, but we've been
19 replacing ties, welding rail, clearing brush, moving rock
20 slides.
21 Q Has there ever been any federal inspection
22 of this since you've been involved?
23 A No, there's not been a federal inspection by
24 the FRA, Federal Railroad Administration inspection. We
25 have had an IRS auditor out on the line.

ANIMAS REPORTING SERVICE

1 were 20 foot high Aspen trees between. This has all been
2 cleared out.
3 Q Those are trees with probably a six-inch
4 caliper?
5 A About that. This is an area just below
6 Creede in what's known as the Willow Creek Reclamation
7 Area.
8 Q That's where you got a letter from the court
9 saying you didn't need a 404 improvement unless you did
10 something drastic?
11 A Yes. The city of Creede made a filing to
12 the Corps of Engineers filing a complaint, etc., etc. This
13 is what we did. We simply cleared off the surfaces of the
14 rails so we could navigate. The Corps came down and wasted
15 nine hours of taxpayer money and said we did nothing wrong.
16 MR. ALLEN: If they hadn't been doing that,
17 they would have been out harassing somebody else.
18 Q (By Mr. Allen) That looks like Creede. Is
19 it Creede?
20 A That's Creede. This is our right-of-way
21 coming up through Section 25. As you can see, the city
22 parks their vehicles on it.
23 Q Okay.
24 A This is the —
25 Q That's the event center?

ANIMAS REPORTING SERVICE

1 Q What was the reason for that?
2 A We just went through a complete audit of the
3 files for the Foundation last week.
4 Q Why? By the IRS?
5 A By the IRS, which we came through just fine.
6 Q Did they issue a document to you saying you
7 came through it just fine?
8 A It will be forthcoming because when she
9 left, everything was crossed off her list, so —
10 Q Did you request the audit?
11 A No, we did not.
12 Q I've quit requesting audits also.
13 A Good move. Welding equipment. Fire
14 suppression.
15 Q Is that welding equipment something that you
16 previously identified?
17 A I believe so.
18 Q Okay.
19 A Digging out this area. New tie just about
20 to be installed.
21 Q Right. We talked about ties the last time.
22 A This is a picture of the Colorado Department
23 of Transportation with their one and only rototill machine
24 brought down from Denver to clear the crossings.
25 Q Why was that done?

ANIMAS REPORTING SERVICE

1 A Because there are crossing agreements
2 between the railroad and the state of Colorado, and these
3 crossings were all paved over so we could not navigate
4 through them. They were blocking the federally authorized
5 railroad.
6 Q And so you couldn't haul your little --
7 A We couldn't bring maintenance equipment
8 through to rehabilitate the line, to open it up for
9 interstate freight rail service.
10 Q Got you.
11 A This is the additional work being done by
12 CDOT crews.
13 Q It's a photograph of a John Deere loader
14 painted orange.
15 A Bridge and Wagon Wheel Gap.
16 Q Okay.
17 A The line is now open for maintenance
18 equipment, maintenance crews, all the way from South Fork.
19 Q Are you going to come to any photographs
20 remaining that we haven't already seen the equipment
21 portrayed?
22 A I don't believe so.
23 Q Do you have an equipment yard? Does the
24 Foundation have an equipment yard anymore?
25 A We have an area designated in South Fork

ANIMAS REPORTING SERVICE

1 currently owned by me.
2 Q Is there any debt on that, or is that
3 something you have free and clear and you can --
4 A No debt on it.
5 Q Is the building erected now?
6 A It's a bolt-together steel building
7 currently erected and will be dismantled and relocated. We
8 own another steel building over there; and I apologize, I
9 have forgotten the size of that one. It's smaller. It
10 will be utilized for shop office maintenance equipment.
11 Q It's also in South Fork?
12 A It is.
13 Q Who owns it right now?
14 A I do.
15 Q Okay. So right now you own both of these
16 buildings, but you're going to donate them to the
17 Foundation?
18 A They're going to the Foundation.
19 Q Does the Foundation pay you anything?
20 A No.
21 Q What do you live on?
22 A I have income from other sources?
23 MR. MICKLEWRIGHT: Objection to
24 relevance.
25 A Income from other sources.

ANIMAS REPORTING SERVICE

1 that we will utilize as our railroad yard.
2 Q You have rail stored there?
3 A There is rail in South Fork. We have more
4 rail sitting up at the Rocky Mountain Arsenal.
5 Q What color value of rail inventory are you
6 holding, you the Foundation?
7 A I would say somewhere in the vicinity of 20
8 to \$30,000 in rail.
9 Q And most of that is at the Rocky Mountain
10 Arsenal?
11 A Significant amount of rail up there.
12 Significant amount of rail along the line laid down at
13 various places or places for rehabilitation.
14 Q Do you have ties stored somewhere?
15 A We have ties in different piles along the
16 line, in critical areas. We have acquired a steel
17 building, 110-by-55-foot steel building.
18 Q Where is the building?
19 A The building is currently in South Fork.
20 It's going to be relocated within the railroad right-of-way
21 in South Fork for shop and service facilities.
22 Q It's 110-by-50?
23 A It's 110-by-55, I think is what it is.
24 Q Does the Foundation own that building now?
25 A The Foundation will own that building. It's

ANIMAS REPORTING SERVICE

1 Q (By Mr. Allen) Okay. Does that cover --
2 what we've just gone through covers all of the equipment
3 yards, equipment buildings, etc., that are either owned by
4 or used by the Foundation?
5 A There's more equipment, more parts, pieces,
6 artifacts.
7 Q I don't want trivia. I want major
8 components. Do you want to confer with Mr. Cutter for a
9 moment?
10 A I'm just trying to think as far as major
11 components. Again, major components are a
12 work-in-progress. There is a lot of things we are working
13 on acquiring at this time. So to say it is currently
14 owned, meaning the transaction consummated, so, therefore,
15 ownership is in the Foundation at this moment, no. Suffice
16 it to say, that's about where we are at this moment.
17 Q Does the Foundation have an insurance policy
18 on this whole thing?
19 A Yes.
20 Q Is a copy of that policy in the file
21 cabinets we went through this morning?
22 A I would think it is.
23 Q We didn't see any insurance policies.
24 A It should have been in there.
25 MR. ALLEN: Could we be furnished with this

ANIMAS REPORTING SERVICE

1 insurance policy whether we've tabbed it or not?
 2 MR. MICKLEWRIGHT: I don't know yet. I
 3 would think there shouldn't be any problem. I won't commit
 4 to it until I've had an opportunity to review it myself.
 5 MR. ALLEN: I take it, Ray, you have not
 6 seen the insurance policy?
 7 MR. MICKLEWRIGHT: No.
 8 Q (By Mr. Allen) Do you know what kind — do
 9 you have public liability as one of the components of that?
 10 A Yes.
 11 Q Can you tell me who the carrier is?
 12 A It was written through — let's see. One
 13 second. It's four different names. Hamon, Demill, Miller.
 14 Q They're the brokers?
 15 A Yes.
 16 Q Do you know who the company is, the carrier?
 17 A We buy it, put it in the drawer, and we
 18 forget the name of who the company is. It's one of the
 19 major companies. It's a policy that was written through
 20 the National Railway Historical Society.
 21 Q Have they imposed any covenants or caveats
 22 or requirements on you as to safety procedures or access
 23 policies or anything of that nature as a condition of the
 24 insurance?
 25 A Only we have had discussions regarding

ANIMAS REPORTING SERVICE

1 have measures, for example, to enforce no trespassing, that
 2 you would not have coverage for someone that comes on the
 3 property and gets injured?
 4 A I don't recall if I had that dialogue at
 5 this moment. We may have.
 6 Q I'm not talking about a dialogue. I'm
 7 talking about a document.
 8 A I don't recall.
 9 Q Okay. Union Pacific. With whom have you
 10 had dealings with at Union Pacific over the past two years?
 11 By "dealings," I mean only substantial dealings. I don't
 12 mean incidental calls or contacts. I don't mean contacts
 13 with secretaries or paralegals. I mean officers or
 14 executives of the company with whom you've had dealings.
 15 MR. MICKLEWRIGHT: I object to the scope of
 16 the question.
 17 MR. ALLEN: I'll try to narrow it.
 18 Q (By Mr. Allen) Have you had dealings with
 19 Gary B. Collins?
 20 A Yes.
 21 Q What has been the nature of your dealings
 22 with Mr. Collins?
 23 A Mr. Collins is senior manager of the real
 24 estate department at Union Pacific Corporate in Omaha.
 25 Q And is he the person with whom you have

ANIMAS REPORTING SERVICE

1 potential liability for a property that is in Creede.
 2 Q Is there a policy provision that has been
 3 called to your attention or that you can recall or you read
 4 or seen or heard about that requires any particular
 5 procedure for enforcing; for example, no trespassing
 6 requirements or other safety requirements?
 7 A Not at this time, but I want to say this:
 8 The insurance gets written for a specific use, for a
 9 specific purpose, and it's based on where you're at at a
 10 certain point in time with the rehabilitation. As this
 11 project moves forward, we will increase our insurance
 12 coverage to include additional things. Our agent said
 13 there's no point in overinsuring the company for a specific
 14 function. As the functions broaden and as the
 15 rehabilitation projects gets into full swing, obviously
 16 we're going to enhance our insurance and have additional
 17 coverage.
 18 Q Was there ever a point, at any point over
 19 the last year or two, where the insurance company had said
 20 you've got to go out and make sure nobody gets on this
 21 right-of-way?
 22 A I don't recall. I've had discussions
 23 numerous times with our agent.
 24 Q But has anybody ever called your attention
 25 to a documentary provision that says that, if you do not

ANIMAS REPORTING SERVICE

1 dealings when you need to postpone or defer payment dates
 2 on the notes to Union Pacific?
 3 A He is one of several.
 4 Q Who are the others?
 5 A Denny Brown. Denny is the director of real
 6 estate for Union Pacific Corporate.
 7 Q Is he senior to Collins or junior to
 8 Collins?
 9 A Senior.
 10 Q And he's also in Omaha?
 11 A Yes.
 12 Q He's somebody that would be in the loop on
 13 the Union Pacific side with regard to postponing a payment
 14 or deferring a payment?
 15 A Yes.
 16 Q Have you ever talked with either Mr. Collins
 17 or Mr. Brown about Mr. Furukawa?
 18 A I don't recall.
 19 Q Is it possible?
 20 A I don't recall.
 21 Q What representations have been made to Mr.
 22 Collins and Mr. Brown regarding prospective sources of
 23 income or funding for the Foundation?
 24 A What comments have been made to him? Is
 25 that what your question was?

ANIMAS REPORTING SERVICE

1 Q Uh-huh. What representations have you said
2 to them, "We need to have this deferred, for example,
3 because I know I've got a guy who's going to give us a lot
4 of money by the end of the year" or something to that
5 effect?

6 MR. MICKLEWRIGHT: Have you used those
7 words?

8 A I don't recall specific verbiage in our
9 discussions. I will say this: The Union Pacific Railroad
10 has bent over backwards to be accommodating to our
11 Foundation. They believe in us. They are hoping for our
12 success, and they have worked with us in granting
13 extensions when necessary because they are sympathetic to
14 the plight and distress that we suffer as a result of this
15 lawsuit.

16 Q (By Mr. Allen) Let's get the other names.
17 Have you had dealings with Don Hartman at Union Pacific?

18 A Don Hartman?

19 Q Uh-huh. His name appears on some of the
20 correspondence I looked at this morning.

21 A You're sure it's Don?

22 Q Might not be.

23 A Is he up in Wyoming?

24 Q I believe so.

25 A I've talked to Mr. Hartman.

ANIMAS REPORTING SERVICE

1 A That is correct.

2 Q So even if you had the ability to haul
3 freight from say Creede down to Derrick, there would need
4 to be some means of getting the car with freight beyond
5 Derrick to get onto a Union Pacific train. Is that
6 correct?

7 MR. MICKLEWRIGHT: Objection. Assumes facts
8 not in evidence.

9 MR. ALLEN: Come on, Ray. It's late. I'm
10 tired.

11 MR. MICKLEWRIGHT: I'm tired, too.

12 MR. ALLEN: Okay, but it's a perfectly
13 proper question.

14 MR. MICKLEWRIGHT: What does this have to do
15 with whether or not Creede's zoning ordinances apply to the
16 railroad right-of-way in the city of Creede?

17 MR. ALLEN: I don't want to try to
18 articulate that. We had a war with Judge Shaffer that I
19 won and you lost over whether or not I can talk about their
20 ability to operate this railroad, meaning he specifically
21 said in the last deposition I could inquire into what would
22 be involved to get it operational. And if you can't haul a
23 stupid rail car past Derrick because all you do at Derrick
24 is have to park it because there's no way, no rights to
25 operate beyond that, and Union Pacific doesn't want to come

ANIMAS REPORTING SERVICE

1 Q How about Bob Opal?

2 A I talk to Bob often. As do you.

3 Q I've talked to him twice in my life, had
4 lunch with him once. Nice fellow. Got an office full of
5 railroading stuff.

6 A Very nice.

7 Q Are there other major personalities at Union
8 Pacific other than Collins, Hartman, Opal and Brown with
9 whom you've had significant dealings at Union Pacific?

10 MR. MICKLEWRIGHT: Objection to
11 foundation.

12 A I have talked to so many people at the Union
13 Pacific. Mr. Ulrich. I think it's Ulrich or Ullrich, and I
14 forget which it is. I believe he is effectively the head
15 of the real estate department. We have spoken. Christine
16 Smith in the legal department. Joe Anthover in the legal
17 department. Joe is no longer there.

18 Q (By Mr. Allen) What has been said in your
19 communications by you and/or by Union Pacific with regard
20 to your acquisition and further rights beyond Derrick?

21 A Further rights beyond Derrick as in heading
22 east, west, what?

23 Q Well, as I understand it, Union Pacific no
24 longer operates regular train service to Derrick. Is that
25 correct?

ANIMAS REPORTING SERVICE

1 up and pick it up, then clearly to get to interstate
2 transportation of freight by rail, it's got to get past
3 Derrick, Colorado, somehow, right?

4 MR. MICKLEWRIGHT: Well, that's your
5 position.

6 MR. ALLEN: Okay. I just want to ask if
7 he's had -- I don't know if you remember. We were down in
8 court. You took the principal position he wouldn't talk
9 about Union Pacific on June 21st, and I had a newspaper
10 clipping that was read to me subsequently that, had I seen
11 it earlier, I'd have said, "Hey, he's giving newspaper
12 interviews about getting operating rights to Monte Vista"
13 or wherever, Del Norte.

14 So I want to ask questions about what's been said by
15 the Foundation and by Union Pacific relative to whether or
16 not there are going to be operating rights, sale of
17 rights-of-way, abandonment and OFA, whatever, to get from
18 the eastern terminus of the Foundation at Derrick to some
19 point where Union Pacific is still operating trains.

20 MR. MICKLEWRIGHT: So, what's the question?

21 Q (By Mr. Allen) The question is, what is the
22 nature of the communications that have gone back and forth
23 between the Foundation and Union Pacific relative to
24 connecting any traffic that comes off your line to Union
25 Pacific past Derrick, meaning east of Derrick?

ANIMAS REPORTING SERVICE

1 A I have had dialogue with Union Pacific and I
2 have had dialogue with Gary Collins, Denny Brown, Bob Opal,
3 a number of people, regarding the potentiality of acquiring
4 additional right-of-way in an eastward direction from
5 Derrick. I have stressed the importance of maintaining our
6 main line connection.

7 Q And what is Union Pacific's stated position
8 to you in that regard?

9 A They are very much aware of the fact that we
10 would like to acquire additional right-of-way.

11 Q Are they willing to sell it to you?

12 A They may be at some point in time.

13 Q Has there been any documentation of any of
14 this communication?

15 A No. It's all been verbal at this point.

16 Q Verbal could be either written or oral. Has
17 there been any written communication about operating either
18 overhead traffic on the Union Pacific line or sale of their
19 right-of-way or some other rearrangement regarding
20 transportation of your stuff beyond eastward past Derrick?

21 A There may have been written communication.
22 I don't remember if I put it in writing or not. I talked
23 to them a number of times. We are at a position right now
24 where they are currently doing a wait-and-see with regard
25 to this lawsuit and the situation, and Union Pacific is

ANIMAS REPORTING SERVICE

1 either by the Foundation to Union Pacific or by Union
2 Pacific to the Foundation relative to service between South
3 Fork and Monte Vista or Del Norte, would copies of such
4 communication have been in the files that we went through
5 this morning?

6 A I would assume so. They should be there
7 unless I didn't keep a copy of them.

8 Q Were the two lateral file drawers, which
9 were about 30 to 36 inches long that Mayor Myers and I
10 inspected this morning, the only files regularly maintained
11 by the Foundation?

12 A Yes. They were present in my office. Well,
13 maybe they're not in my office. They may be in my truck.

14 I have the maps of the railroad alignment from Derrick to
15 Monte Vista, and they were sent to me by the Union Pacific
16 when we commenced dialogue.

17 Q How long has this dialogue been going on
18 about your operating past Derrick?

19 A Several months.

20 Q Has anyone said, "We can work that out for
21 you," or words to that effect?

22 A I don't know if I'd use terminology to that
23 effect, but given the good working relationship shared
24 between the Foundation and the Union Pacific, I think that
25 in time we could certainly reach a harmonious agreement.

ANIMAS REPORTING SERVICE

1 comfortable in negotiating with us. They said they would
2 certainly entertain that, but they wanted to identify its
3 net liquidation value.

4 Q Have they communicated anything to you about
5 a net liquidation value?

6 A No, not at this time.

7 Q What is the western-most point that they now
8 serve going toward Derrick?

9 A South Fork.

10 Q No. Where they have an actual operational
11 train from.

12 A They're bringing tank cars in and out of the
13 valley still. These are dust-suppression carrying flat
14 cars or tank cars, and they brought them into South Fork
15 through the course of the spring, winter.

16 Q When did the sawmill close?

17 A The sawmill formally closed December of last
18 year.

19 Q Does it still have sort of cleanup and, you
20 know, close-down things going on there?

21 A There is still remediation being done.

22 Q Does that have implication of some rail
23 service in or out, to haul things in or out?

24 A Not that I've seen.

25 Q If there have been any written communication

ANIMAS REPORTING SERVICE

1 Q I take it, the Foundation does not have a
2 file anywhere that collects in one place all of its
3 corporation documents, such as articles, bylaws, corporate
4 resolutions, corporate minutes?

5 A I know the bylaws and articles and the
6 addendum and everything was in one file. I saw BJ go
7 through that or Mayor Myers go through that and it was in
8 her lap. If they were placed back in my drawer in a
9 different location, then I had no control of that.

10 Q I didn't see anywhere in the files I looked
11 at, a ledger or journal or some bookkeeping record of all
12 of the financial transactions of the Foundation. Is there
13 such a record?

14 A Yes. It's there in the office.

15 Q Was it in the file drawer?

16 A It should have been. That's prepared by our
17 bookkeeping service, and it was brought over there in the
18 office for the IRS audit. It was completely gone through.

19 MR. ALLEN: Ray, I want the same position
20 with regard to the ledger and journals that we have on the
21 insurance policy, which is, whether we put stickies on them
22 or not, we want to receive copies of them.

23 MR. MICKLEWRIGHT: I thought it was in the
24 folder you looked at yesterday, but --

25 THE WITNESS: I could swear he had it in his

ANIMAS REPORTING SERVICE

1 hand yesterday.

2 MR. ALLEN: I might have. In any event,
3 let's take a moment while I digress on that. This morning
4 for about two hours, Mayor Myers and I inspected two
5 lateral file drawers which were made available to us from
6 about 3:30 yesterday afternoon. I did not arrive in
7 Durango until about 4:14 yesterday afternoon. We had
8 discussion about where the deposition would take place. I
9 took about a 20-minute look just in a general way to get a
10 sense of what the inspection task was going to involve.

11 I did not actually identify any documents yesterday
12 for copying pursuant to an agreement Mr. Micklewright and
13 I, made between ourselves. By conversation and colloquy
14 between us, we agreed we would go through the files this
15 morning, which we did, and we used two colors of stickies,
16 3-M Post-It notes, yellow ones to denote things we wanted
17 copied and pink ones to denote things that we wanted copied
18 and brought to this deposition.

19 My understanding is that the Foundation will go
20 about making copies of the items we identified and furnish
21 them to us and will charge us some rate which, hopefully,
22 is not more than 25 cents a page for the cost of copying.
23 Does that comport with your understanding, Ray?

24 MR. MICKLEWRIGHT: Well, I don't know how
25 much we're going to charge for copying or costs associated

ANIMAS REPORTING SERVICE

1 Oh, let me back up. With regard to the documents
2 that we have requested be copied or have already been
3 furnished to us, do I properly understand that all of those
4 are subject to the Protective Order that we agreed upon?

5 MR. MICKLEWRIGHT: Yes.

6 MR. ALLEN: With the exception of, say,
7 where they are public record in the STB or something like
8 that?

9 MR. MICKLEWRIGHT: That's correct.

10 MR. ALLEN: Fine. If something is a court
11 pleading or STB file document, we don't have to preserve
12 any confidentiality regarding that.

13 MR. MICKLEWRIGHT: Unless they themselves
14 are subject to some confidentiality order.

15 MR. ALLEN: Independent of the order that we
16 have in this case.

17 MR. MICKLEWRIGHT: That's correct.

18 Q (By Mr. Allen) Other than the people we
19 have just gone over, Hartman, Opal, Brown, Collins, Joe —
20 what's his last name?

21 A Anthover. Joe retired a year ago.

22 Q Is he an Omaha guy?

23 A He was.

24 Q I'm going to have some questions about
25 Leslie Paisley.

ANIMAS REPORTING SERVICE

1 with that, but I know it will be commensurate with the
2 correspondence that we got from the city that said how much
3 they were going to charge us to make documents.

4 MR. ALLEN: Okay. So we'll have some sort
5 of symmetry about copying documents. And at some point in
6 the next few days to a week or so, we'll get those copies.

7 MR. MICKLEWRIGHT: Let's be clear. With
8 respect to the documents that you requested be produced to
9 you immediately, those documents were copied and made
10 available to you this afternoon prior to the deposition.

11 MR. ALLEN: Right, and I believe we received
12 them.

13 Okay. In addition, in case we missed it, our
14 request is that we be given a copy of the insurance policy.
15 We may have seen it and tabbed it. I just don't know.
16 That was just described by Mr. Shank. Also, that we get a
17 copy of the Foundation accounting records, meaning the
18 ledgers and the journals, journal entries, which he has
19 just described in his testimony in the last couple of
20 minutes.

21 When we conclude today, we probably want to do a
22 wrapup in case there are any other documents that occur to
23 us, but that's where we are right now. I don't think I
24 have anything else that's going to implicate
25 confidentiality.

ANIMAS REPORTING SERVICE

1 A Parsley.

2 Q Parsley. Okay. I can't read my own
3 handwriting. And Leslie Parsley is a woman or man?

4 A Woman.

5 Q Okay. As I understand it, she is involved
6 or has been involved in an attempt at fund-raising with the
7 Foundation. Is that correct? Grant applications?

8 A She was. She was briefly.

9 Q Is that area of communication something that
10 you would want Mr. Burkett and Mayor Myers included in, or
11 can we get them back in the room while I ask questions
12 about them?

13 A I think exclusion is appropriate.

14 Q Okay. Was Ms. Parsley — and I saw an
15 envelope that had an address in Denver, 4087 South Quebec.
16 Is that where she now is?

17 A No. She moved away back east.

18 Q What role did she play?

19 A A very brief role. An individual that was
20 trying to help the Foundation took it upon himself to
21 engage her on our behalf, and she was utilized only
22 briefly. It became apparent that she was not real astute
23 at that profession, and her services were terminated.

24 Q And had personal problems as well?

25 A Big personal problems.

ANIMAS REPORTING SERVICE

1 Q I saw something in there referencing
2 something about bipolar disorder.
3 A It got to a situation between she and the
4 person that recommended her. They just were at each other,
5 and I distanced the whole bunch.
6 Q With what potential granting entities was
7 she involved? I saw the Gates Foundation. Was she
8 involved with him?
9 A No. I talked to the Gates Foundation.
10 Q With what potential granting organizations
11 or entities was she involved in?
12 A If memory serves me correct, she and another
13 gentleman had contacted the Freeman Foundation, I believe
14 is the name. They're back East. I don't know this to be
15 factual, but it was my understanding at the time that they
16 said that the Freeman Foundation was well versed in
17 fund-raising and grant monies for railroad usage.
18 Q Anybody else or any other entity?
19 A I think that's the only one that they
20 submitted anything to. And it was such a ridiculous
21 filing, that it was one of the reasons it was terminated.
22 Q If I want to inquire as to what other
23 foundations or entities with which you've had
24 communications or grant applications, is that something you
25 want people included in?

ANIMAS REPORTING SERVICE

1 A Where we were going after just a large
2 general grant, we are now going at it in a more specific
3 manner identified or earmarked for what could be a piece of
4 equipment or materials for a specific job or function
5 rather than going after general funds.
6 Q So now you're more targeted?
7 A More targeted. It was a learning curve.
8 Q What would you estimate to be the size of
9 your office in Durango?
10 MR. MICKLEWRIGHT: Objection. Relevance.
11 A I believe that office is a 12-by-12.
12 Q (By Mr. Allen) So about 225 square feet,
13 250?
14 A 12-by-12 would be about 144 square feet.
15 Q Sorry. You're right.
16 A It's small.
17 MR. ALLEN: Okay. Okay. I want to take a
18 break to go to the men's room, and then I want to talk
19 about leasing in Creede. Does that have confidentiality
20 implications? I don't think so. I saw all kinds of verse
21 going back and forth. I realize that the documents are
22 going to be confidential.
23 THE WITNESS: Each lease unto itself would
24 be confidential.
25 MR. MICKLEWRIGHT: I think if we're going to

ANIMAS REPORTING SERVICE

1 A I would prefer them excluded.
2 Q Can you tell me what other entities or
3 grant-making institutions or foundations have been the
4 subject of communications from your foundation?
5 A I have spoken with the Boettcher Foundation.
6 B-O-E-T-T-C-H-E-R. I believe it's two T's. The Ford
7 Foundation, Microsoft Foundation, the Gates Foundation,
8 Adolf Coors Foundation.
9 Q When you say Gates, you mean --
10 A Gates Tire and Rubber. It's the Gates
11 Family Foundation, is what it's called.
12 Q Not the William and Melissa Gates
13 Foundation?
14 A No. Although we have sent letters inquiring
15 to Microsoft Corporate. National Trust for Historic
16 Preservation. Let me think.
17 Q Have any of these responded with actual
18 contribution funds to your foundation?
19 A No, but we have dialogue, and we're working
20 in a different direction now. Where it became readily
21 apparent that we were going about this in a manner that was
22 not overly successful with these foundations, there is
23 another course of direction which we will reapply to them.
24 Q What is the difference between how you were
25 doing it and how you plan to do it?

ANIMAS REPORTING SERVICE

1 talk about documents that are confidential, I don't think
2 these folks need to know about it. I think the Mayor does.
3 I don't understand why she's excluded.
4 MR. ALLEN: She didn't want to be in.
5 MR. MICKLEWRIGHT: Who are you going to talk
6 to if you can't talk to the Mayor?
7 MR. ALLEN: She was sensitive to her
8 potential obligations under the Sunshine Law or open
9 records or whatever. Okay. Let's take a break while I go
10 to the men's room.
11 I'll get the Mayor back in, and I want to see what
12 the potential revenue stream is and whether or not the
13 leasing regime or real estate development regime on the
14 right-of-way is potentially a major source of revenue and
15 if anything has been done to actually get parcel by parcel
16 metes and bounds, descriptions of the properties being
17 leased. So that's where I'm going next.
18 (Recess taken.)
19 MR. ALLEN: We've been on a break for about
20 ten minutes. It's now 2:35 p.m.
21 Q (By Mr. Allen) As I said before we took the
22 break, to try to identify how you're going to get money to
23 get operating and pay the Union Pacific --
24 A Is that why we took the break?
25 Q We took the break so I could go to the men's

ANIMAS REPORTING SERVICE

1 MR. ALLEN: I've been advised by Mayor
2 Myers, "By some of the land owners on the block." By that,
3 I assume it means they've had some surveying done, but it's
4 not complete.
5 THE WITNESS: Was this Davis Engineering?
6 MAYOR MYERS: No.
7 Q (By Mr. Allen) Do engineering companies go
8 out and do that on spec, just to have a database that they
9 can then settle? I don't know.
10 A I don't know either. I'm not an engineering
11 company.
12 Q Or surveyors?
13 A That's their time. That's their stock and
14 trade. Just like a lawyer, I would assume they're going to
15 go out and get paid handsomely for it.
16 MAYOR MYERS: Do you want me to answer it?
17 What they do is, like Davis Engineering, they've been
18 surveying in Creede for years and years and years. They
19 use their corner points that they have identified to survey
20 other portions of the town, but they don't go in and survey
21 something just to be surveying it so that they have it on
22 record.
23 THE WITNESS: Do you know if this work that
24 was done recently by, for lack of a name, XYZ Surveyor, do
25 you know if this work was done based on existing markers

ANIMAS REPORTING SERVICE

1 the right-of-way?
2 A Well, it is my understanding that the
3 Foundation is the owner of the right-of-way based on the
4 transference of documents, being title documents, etc.,
5 specifically defined by those documents transferred from
6 the Union Pacific Railroad which, of course, is in
7 succession from Southern Pacific, Denver and Northwestern.
8 Q And the Foundation's predecessors and
9 interest, namely, Union Pacific, Southern Pacific, D&RG,
10 were certainly collecting rents from at least some of the
11 rental properties on the right-of-way?
12 A They were. There is historic data to
13 support that.
14 Q And when you bought the right-of-way from
15 Union Pacific, those lease holding lists were assigned to
16 the Foundation? When I say "you," I mean the Foundation.
17 A That is correct.
18 Q What I'm now getting at is, the extent to
19 which that represents a potential source or actual source
20 of substantial revenue stream that can be used by the
21 Foundation of recurring revenues coming in every month or
22 every six months or however often, to address some of the
23 Foundation's other financial requirements. So that we can
24 get a handle on what it is and about what it can be.
25 And, if you will, or if Mr. Micklewright would let

ANIMAS REPORTING SERVICE

1 that were placed there by either the railroad, or were they
2 placed there by the survey that we know was done wrong back
3 in about 1892?
4 MAYOR MYERS: I don't know the answer to
5 that question.
6 THE WITNESS: Okay.
7 MR. ALLEN: Well, for whatever this is
8 worth — and I've done a fair amount of work over the last
9 ten years involving buildings in Telluride, where, again,
10 in the 1890's, they just mucked it up in terms of
11 surveying. That's because nobody thought the towns were
12 pertinent.
13 THE WITNESS: Evidently, they weren't.
14 MR. ALLEN: Mining claims were carefully
15 surveyed and jacks put in towns, and they were pretty
16 casual about where things were because they thought they
17 were putting up little wooden jacks that would last for
18 five or ten years while they mined out that load and moved
19 on. Now, of course, millions of dollars are involved in
20 real estate values in the towns.
21 THE WITNESS: Uh-huh.
22 Q (By Mr. Allen) Well, it is fair to say, is
23 it not, that, one, the Foundation, as the owner having the
24 right to use the right-of-way, asserts the position that
25 it's entitled to rental income from properties that are on

ANIMAS REPORTING SERVICE

1 you do so, I would like you to just explain where real
2 estate leasing fits into the scheme of things for the
3 Foundation as one of its profit centers or revenue
4 contributors or whatever.
5 A Well, as far as the leases within the city
6 limits of Creede — and the majority of those, as you know,
7 are on the west side of Main Street within the confines of
8 Section 25. Those leases, there isn't any one of them that
9 is of any significant value as far as the dollar amount. I
10 mean, we're not talking about gobs of money that are going
11 to have a dramatic effect on the operation or viability of
12 the railroad, nor were they ever looked at in that light.
13 These were and are and do represent a viable income
14 stream based on their historic use and the fact that these
15 leases have existed for years and years and years and were
16 paid on by the lessees to the lessor, the railroad, for
17 years and years and years.
18 It is my understanding that — and, again, this is
19 third-party information, but it is my understanding that we
20 did issue a number of new leases to the tenants along the
21 line, of which there are a lot more that need to have
22 leases issued to them. But it's my understanding that the
23 Mayor did take it upon herself to advise people not to sign
24 these leases. And, again, I'll state for the record that
25 this was third-party information. I don't know this to be

ANIMAS REPORTING SERVICE

1 factual, but it has been conveyed to us a number of times
2 by a number of different people.

3 We're not talking about a fortune in these leases,
4 so I'm not going to sit here and say, "If I don't have the
5 income from these leases, we can't rebuild the railroad."
6 That simply isn't the case.

7 Q But they could be a significant
8 contribution?

9 A Anything can be a significant contribution.
10 These will be a contribution of a certain amount, but
11 everyone there, with the exception of the Masonic Park and
12 Louise Gray, have chosen to look to their counsel as
13 opposed to executing a lease document or vacating the
14 property.

15 Q Have you established some sort of a scale of
16 what the Foundation regards as a reasonable dollar value
17 per square foot or per acre or some basis for leasing?

18 A Leases were calculated on the value per acre
19 divided down and multiplied by a factor based on the square
20 footage with a number of other factors that were involved.
21 It was a complex formulation which I don't have in front of
22 me, nor am I able to pull off the top of my head. But they
23 were also a fair and equitable lease and, given the value
24 of commercial ground within the city of Creede, quite a
25 deal for the lessees.

ANIMAS REPORTING SERVICE

1 quantity of site per square footage, acreage or money that
2 this represents.

3 I also want to be able to establish that the impact
4 of Creede's zoning is not merely hypothetical; that the
5 Foundation exists within a matrix of real estate
6 transactions, development, usages and so forth. So to the
7 extent that the Foundation is engaged on its right-of-way
8 in non-railroad activity, nevertheless — you know, based
9 on a lot of the law you cited involving what railroads can
10 do with their rights-of-way, gas development, timber, etc.,
11 that there is an area for legitimate police power exercise
12 as to non-railroad activities on the right-of-way.

13 MR. MICKLEWRIGHT: I don't mean to argue
14 with you, but you're not asking him about what might occur
15 in terms of what the railroad is doing, but you're talking
16 about whether or not or what is the nature of existing
17 businesses now, which I would assume are subject to
18 regulation by the city of Creede, so —

19 MR. ALLEN: No. I mean, maybe somebody is
20 going to assert that the city of Creede cannot exercise its
21 zoning on Section 25 with regard to BJ's gallery because
22 that's preempted by potential railroad activity or that the
23 railroad's leasing regime was part of its activity, but we
24 had early on in this, a letter from your co-counsel, Mr.
25 McFarland, with kind of a global statement of total — from

ANIMAS REPORTING SERVICE

1 Q Well, the Foundation would be within its
2 rights, would it not, to either use measurements it has of
3 the footprints of what's occupied or go out and make
4 measurements and then lease those properties to the
5 occupants of the right-of-way at prevailing commercial
6 rates or residential rates within Creede for comparable
7 properties. Is that a fair statement?

8 A I would feel that the Foundation would be
9 well within its rights to do so.

10 MR. MICKLEWRIGHT: Well, let me object to
11 this line of questioning. I mean, is this getting to a
12 zoning question?

13 MR. ALLEN: Yeah. What I want to do is
14 establish that — ultimately what I'm driving at is two
15 different but linked issues, Ray.

16 One is revenue stream, to get some sort of sense of
17 whether or not there is a source of revenue out there that
18 is sufficient to give anyone any basis to infer that there
19 will ever be enough revenue to operate a railroad. Okay.

20 What I'm telling you, and I recognize you disagree,
21 is, we think there is not a sufficient revenue stream to
22 operate a railroad and that that's potentially fatal to the
23 rights to continue to have OFA rights. And Mr. Shank has
24 just said that this isn't a big source of revenue. So I
25 want to try to get definition here. I want to get a

ANIMAS REPORTING SERVICE

1 one side of the right-of-way to the other, the railroad
2 owns it all, the railroad — the Foundation controls it
3 all, needs it all, is presumed to need it all, etc. I'm
4 trying to — I don't think that that aggressive a statement
5 is valid.

6 I'm trying to get a sense in a real world situation
7 in Creede of what are the boundaries of the potential
8 application of the zoning on the one hand and the potential
9 application of the preclusion or preemption on the other
10 hand.

11 MR. MICKLEWRIGHT: I understand that.

12 MR. ALLEN: So to get a sense of what this
13 lawsuit is about and what Creede's rights are vis-a-vis the
14 Foundation. I mean, one of the things that may eventuate,
15 since 90 percent of all litigation is settled, is that what
16 we do in this litigation is form a dialogue in which maybe
17 ultimately somebody comes to some sort of agreement rather
18 than a litigated outcome as to who's doing what in Creede.
19 You know, who's regulating what, who's charging what, who's
20 paying what, for what it's being paid, what are the
21 standards by which those things are established? You know,
22 is the Foundation doing customary rents; Louise Gray? Is
23 it doing market value rents? Is it somewhere in between?
24 Where does this fit into the Foundation picture?

25 MR. MICKLEWRIGHT: They're a landlord.

ANIMAS REPORTING SERVICE

1 MR. ALLEN: Okay. I want to get — rather
2 than you say that, I want to get Mr. Shank to explain,
3 because he's the guy who's been authorizing the
4 correspondence, I presume, making the phone calls, having
5 the communication, to describe where a leasing regime,
6 which is obviously part of what they're doing, at least at
7 some level fits into the overall plan. How much revenue it
8 can generate, where they need to go with it, whether
9 they're going to go out and do measurements or whatever.
10 Whether they're going to get an appraiser in to say,
11 "Here's what is fair."

12 I just want to know what they're dealing with here.
13 It seems to me, since there is clearly some sort of an
14 undertaking to continue what Union Pacific and its
15 predecessors were doing, all of which is on Section 25, I
16 want to get a sense of that. And since Section 25 is a
17 potential reversion to the town under 43 USC Section 912,
18 if there is an abandonment, I see all of this as being a
19 part of what we're dealing with, and I don't think it's
20 terribly sensitive. I'm happy to preserve confidentiality
21 as to what gets said by Mr. Shank to a particular person,
22 but that's where I'm going.

23 MR. MICKLEWRIGHT: Is it your position that
24 Section 25 has reverted to the city?

25 MR. ALLEN: No. I mean, it can only revert

ANIMAS REPORTING SERVICE

1 passed down to us, to the Foundation, from the predecessor
2 railroads. Leases existed. People benefit from the
3 utilization of the railroad right-of-way.

4 A prime example being Mayor Myers. She has Amethyst
5 Emporium at the back — and I'm not sure of what the number
6 is. I had it suggested to me, the back third or back 40
7 percent of her business resides on railroad right-of-way.
8 Whether that is the truth or not, I don't know. I'm going
9 by the square footage identified by the railroad and the
10 fact that the lease was paid for years and years and years
11 by Margaret V. Myers, Mayor Myers' mother, was passed to
12 her, and a similar situation with other lessees along the
13 area. Yes, it represents an income stream. As I stated
14 previously, no, we're not going to get rich off of this,
15 but it does represent funds that can be utilized for the
16 benefit of the Foundation, for operational costs perhaps of
17 the office, but it can be thrown in the —

18 Q You can buy ties, you can buy rails?

19 A We can do a number of different things with
20 it. We're not going to rehab a whole railroad based on the
21 leases we have in Creede, but every bit of income is
22 important to the Foundation. And we don't feel that we
23 should be forced to overlook any income stream.

24 Q How many properties approximately are there
25 within Creede that could be leased, that could have valid

ANIMAS REPORTING SERVICE

1 to the city under the doctrine of Law I made in the
2 Phillips case. By the Phillips case, I think that I
3 established forever and for all time that nobody but the
4 Surface Transportation Board authorizes abandonments.
5 That's what the ICC said, that's what the STB said, and
6 that's what the circuit courts agreed with, and that's what
7 the Supreme Court denied per curiam.

8 So we know where we stand. It can only be abandoned
9 if the STB says it's abandoned. If it's abandoned, it
10 reverts, where it's in the municipality to the
11 municipality. Outside the municipality, it reverts to the
12 adjoining landowners. What I want to get a sense of is
13 where this fits into the Foundation's strategy or business
14 plan for what its revenue sources are.

15 MR. MICKLEWRIGHT: Okay.

16 Q (By Mr. Allen) So if you can explain that
17 rather than have me ask it question by question, I'd be
18 delighted to have you do so.

19 MR. MICKLEWRIGHT: I'll object. It calls
20 for a narrative, but if you can, answer it.

21 A I'll try to answer this in narrative form,
22 but let's keep it brief. Obviously, this is a separate
23 function of the Foundation as opposed to operating a train
24 or anything else. This is another source of income. It's
25 a revenue stream. Yes, it's there. It's rights that were

ANIMAS REPORTING SERVICE

1 Leases on them?

2 A There is a number of them. As I stated
3 earlier, there is a number that do not have a lease that do
4 occupy a portion of that right-of-way.

5 Q Can you quantify that? Is it 20, 50, 1,000?

6 A I guess it could be somewhere between 15 to
7 20.

8 Q About what percentage does that represent,
9 say, of the total commercial inventory of real estate in
10 Creede?

11 A I'm not sure. Perhaps Mayor Myers could
12 enlighten us.

13 Q If you had in place the kind of leasing
14 regime that a real estate operating company would have —

15 A Real estate management firm?

16 Q Real estate management firm.

17 A All right.

18 Q Where, on a fair basis, you are leasing all
19 of the land that was occupied to the tenants at reasonable
20 rates. Maybe market minus ten percent or something.

21 A Whatever.

22 Q If that were the case, would the Foundation
23 then be likely to be the largest commercial landowner —
24 landlord in Creede?

25 A I don't know. I don't think so. Creede

ANIMAS REPORTING SERVICE

1 covers a lot larger area than what we're talking about
 2 here. We're talking about the west side of Main. What, a
 3 one, two-block area?
 4 Q But I would think that most properties in
 5 Creede are owner occupied. So if we talk — if we confined
 6 this dialogue solely to properties which are occupied by
 7 tenants.
 8 A Some say owner occupied. That would be
 9 admitting facts not in evidence. I don't know what is
 10 owner occupied versus what isn't.
 11 Q Okay. A fairly viable national statistic
 12 that seems to hold up in the United States over generations
 13 is about 60, 65 percent. Generally speaking, 65 percent of
 14 all the real estate in the United States —
 15 A Is owner occupied?
 16 Q — is owner occupied.
 17 A I don't know if this would —
 18 Q I don't know if it's true in Creede or not.
 19 THE WITNESS: We can deal with the Mayor.
 20 Do you have any historic documentation to support that?
 21 MAYOR MYERS: With the exception of five
 22 businesses, I believe all of the rest of the businesses are
 23 owner occupied.
 24 THE WITNESS: Is that the case within
 25 Section 25, west side of Main?

ANIMAS REPORTING SERVICE

1 then paid all these years and then chose not to upon our
 2 purchase. I can't give you that figure. I don't know what
 3 the return on investment would be on that. I don't know
 4 what factors we would be looking at. We don't have the
 5 data right now.
 6 Q Somebody prepared them. I've seen the
 7 leases attached, a couple of them, to documents I found.
 8 These are very carefully drawn commercial lease documents.
 9 I assume they're all pretty much the same document. I
 10 assume at some point you or somebody working with you gave
 11 some thought to what kind of a lease you were going to have
 12 with tenants on the right-of-way, fairly careful thought?
 13 A Yes.
 14 Q I recognize the privilege, but I'd be
 15 interested in knowing who drafted the leases, whether you
 16 did or counsel did so, or a combination of that or
 17 whatever?
 18 A It's a combination.
 19 Q They looked to me as though they were a
 20 lease document base — if you will, base form that was
 21 particularly crafted to address occupation of a railroad
 22 right-of-way in terms of insurance clauses and a lot of
 23 other things. Is that fair?
 24 A There is verbiage within the text of the
 25 lease that is specific to railroad.

ANIMAS REPORTING SERVICE

1 MAYOR MYERS: In Section 25 of the west side
 2 of Main, all of them are owner occupied.
 3 THE WITNESS: Every one of them?
 4 MAYOR MYERS: Well, I take that back.
 5 Sorry. Not the Masonic Lodge. It's owner occupied in the
 6 sense that they occupy the upstairs and they lease the
 7 downstairs. But I'm trying to go down the block, and I
 8 believe all the rest of them are owner occupied.
 9 THE WITNESS: Okay.
 10 Q (By Mr. Allen) Okay. Once you've made the
 11 final payments to Union Pacific, you're going to have a
 12 book value investment of something like — what? \$600,000?
 13 A Just for the purchase alone?
 14 Q For the purchase of land?
 15 A Six and a quarter.
 16 Q Okay. To what extent does a revenue stream
 17 from a leasing regime within the city of Creede alone —
 18 I'm not talking about the other 20-plus miles within the
 19 right-of-way. But in looking at producing a return on that
 20 investment, what is the maximum that you might be realizing
 21 from lease rentals from Creede if you had everyone on a
 22 lease and you had them all performing?
 23 A I don't have those figures. We haven't
 24 calculated out the figures for the people who haven't had a
 25 lease. We only did it for the people that have had one and

ANIMAS REPORTING SERVICE

1 Q May I ask, was it Mr. McFarland? I
 2 recognize he is an expert in railroad right-of-way matters.
 3 In other words, was it he who was the sort of master
 4 architect of the lease structure?
 5 MR. MICKLEWRIGHT: I'll object to the scope
 6 of the question and foundation. Are you talking about the
 7 current leases, or are you talking about the Union Pacific
 8 leases?
 9 MR. ALLEN: No. Talking about the leases
 10 that were drafted by Mr. Shank's foundation and proposed to
 11 at least several of the tenants, which looked to me to be
 12 pretty much the same form, I mean, attached to Louise
 13 Gray's lease and I think one other. And I just wanted to
 14 know where that came from, who was the architect of that
 15 lease documentation.
 16 MR. MICKLEWRIGHT: Objection to relevance.
 17 Can you answer that question?
 18 A I could answer it. The lease document in
 19 its current form is a compilation of a lot of similar
 20 information from historic leases, leases that were in place
 21 previously by the D&RG, with Southern Pacific, some new
 22 information that was placed within the text of the lease as
 23 suggested by Union Pacific and also and then sent for
 24 review and modification by Mr. McFarland.
 25 Q (By Mr. Allen) Ultimately, do you think it

ANIMAS REPORTING SERVICE

1 might become necessary to actually litigate the issue of
2 whether the people are going to or not going to pay rents
3 to the Foundation?

4 A Well, I would certainly hope that it
5 wouldn't come to that. I think these people are wrong in
6 the manner in which they're going about this, which
7 includes Mayor Myers. I think all these people benefit
8 from the railroad right-of-way to use for their commercial
9 and personal property. They're gaining, they're generating
10 revenue by virtue of the availability of that property, and
11 I certainly think that that has value and that we should be
12 entitled to compensation for the use of our property.

13 That's historically what has taken place. And
14 simply because we're not the multibillion dollar
15 conglomerate that the Union Pacific or Southern Pacific or
16 Denver Rio Grande is or was, I don't think our rights are
17 any less and we shouldn't simply be looked at as this small
18 Colorado charitable foundation. "Let's go take advantage
19 of them." I don't think that's appropriate, and that seems
20 to be what the nature and scope of their mission is.

21 Q Have you been following the dispute that's
22 ongoing between the Union Pacific and the city of Aurora,
23 Colorado regarding right-of-way leasing in Aurora?

24 A I heard bits and pieces. I'm not real well
25 versed in it.

ANIMAS REPORTING SERVICE

1 on some kind of regularized negotiation of what your return
2 should be? I mean, I recognize you would adjust one
3 property up maybe for a better location and another one
4 down for a poorer location, but is there some negotiation
5 for a base rate in there that you think the Foundation
6 should be getting, generally speaking, for its —

7 A All right. As a prime example, Allen, the
8 lease that was executed, funds forwarded by Louise Gray was
9 our minimum lease. We did not take into account location,
10 square footage, use or anything else. That was just simply
11 the minimum figure.

12 Q You think \$300 a year is a fair kind of
13 nominal rent for residence for someone like Louise Gray?

14 A I do. And when you realize that 25 years
15 ago, she was paying 250, I mean, an increase of \$50 over
16 that time period, I do not feel is exorbitant.

17 Q Is there some kind of — when you sent out
18 the letters, you sent out something like a dozen letters of
19 proposed leases?

20 A I'm not sure of the number. It could be
21 ten, twelve. I'm not positive.

22 Q From a range of like from eight to twelve
23 letters. These would be people who already had leases with
24 Union Pacific or its predecessor?

25 A Historic lessees.

ANIMAS REPORTING SERVICE

1 Q As I understand it, Union Pacific has asked
2 that a leasehold rental for an Aurora city street that is
3 on a 1975 Act right-of-way be increased from 7,000 a year
4 to seven million a year.

5 A I think that if you review the lease
6 documents that these people all executed with the
7 predecessors and you look at what's been issued by our
8 foundation, I don't think you're going to find a rate of
9 increase even remotely close to that.

10 Q Okay.

11 A I'm not going to agree or condone what
12 they're doing with that. That's a different company and
13 different issues. I'm sure they have their reasons for
14 attempting to increase a lease evaluation of that
15 magnitude.

16 Q What is your sense of a fair either monthly
17 or annual square foot ground lease for commercial property
18 in the city of Creede today?

19 MR. MICKLEWRIGHT: Objection. Relevance.
20 Calls for speculation.

21 A Because of the fact that I don't have my
22 facts, figures, square footages, location usage and
23 formula, I can't really give you that figure at this time.

24 Q (By Mr. Allen) When you've sent out
25 proposed leases to businesses, for example, are those based

ANIMAS REPORTING SERVICE

1 Q Okay. Is there some kind of a template or a
2 standard, or whatever, by which you have made a proposal to
3 these individuals or businesses for what their rate of
4 leasehold rent should be?

5 MR. MICKLEWRIGHT: Objection. Asked and
6 answered. Relevance.

7 MR. ALLEN: I'm trying to get at a revenue
8 stream, Ray. That's all.

9 A Well, the tenants aren't paying. There
10 isn't any. There isn't any revenue stream. No revenue
11 trickle.

12 Q (By Mr. Allen) But it's just a matter of
13 probably a few letters from Ray Micklewright, and they'll
14 either be paying, or they'll be defendants in lawsuits. I
15 mean, if you got the rights you have, and I'm not debating
16 them one way or the other, and you're not being paid, the
17 Colorado law is pretty clear that you're entitled to
18 recover fair rental value.

19 A Or they vacate.

20 Q Or they vacate. You can kick them out.

21 A Which is not my preference, by the way.

22 Q I understand. You'd rather be paid than —
23 you know, you'd rather have them paying you than you paying
24 Ray Micklewright?

25 A We discussed surveying this earlier. The

ANIMAS REPORTING SERVICE

1 cost of a survey would be probably more than the aggregate
2 of 90 percent of those leases, so — you know.

3 Q But you could arrive at approximate square
4 footage without going to the full blown certified survey.

5 A We can take the survey from the railroad —
6 we can look at the historic leases executed by the current
7 lessees or the owners of these properties. They
8 acknowledge this lease. They signed this lease with the
9 predecessor railroads. So, it wasn't a matter of dispute.
10 They signed it. They were paying their lease. Now
11 suddenly, you know — whatever. I can go by the square
12 footage as identified on the railroad drawings within those
13 old leases.

14 Q And come up with —

15 A And come up with a formula and factor for
16 determining what their rental should be. And I think
17 predominantly the various businesses along the west side of
18 Main, for the most part, would be paying a relatively close
19 figure based on the square footage.

20 Tompkins Hardware, of course, is a major exception
21 because that's a company that is clearly depending upon the
22 usage of the right-of-way for their business, for their
23 livelihood, for existence, because they've got their whole
24 lumberyard on the railroad right-of-way. A good portion of
25 their retail store is on railroad right-of-way. So, that's

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1 the files.

2 MR. ALLEN: I think I put a sticky on each
3 transmittal letter of the lease document, but if I didn't,
4 I don't want the same boilerplate form over and over and
5 over. But I would like the transmittal letter and a top
6 sheet, whatever, that would show us the proposed lease
7 amount in the document production. And I don't want a
8 replication of all 35 pages.

9 THE WITNESS: The lease document. You want
10 the meat-and-potatoes of the lease.

11 MR. ALLEN: I want to know what the
12 potential pricing is and what the potential revenue stream
13 is so we can try to get some sense of what's going on here.

14 THE WITNESS: Okay.

15 Q (By Mr. Allen) We talked about liability
16 insurance. Do you know what premium is being paid annually
17 for insurance on the right-of-way?

18 A Dollar amount?

19 Q Yes.

20 A Eight hundred and something.

21 Q For a year?

22 A Yes. It's for two million in coverage, I
23 believe it is.

24 Q Toxic waste?

25 A I haven't been —

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1 a major factor, and they utilize a big piece of the ground.
2 Q Okay. What is the highest amount that you
3 have sought from a prior acknowledged lessor — lessee of
4 railroad right-of-way real estate?

5 A I would say that probably — and without
6 having all of the files in front of me, I would say it's a
7 fair assumption that Tompkins Hardware would probably be
8 the largest by virtue of the fact —

9 Q You made a proposal to them. I take it, you
10 sent them a lease and said to please sign it?

11 A I sent them a lease with a standard letter
12 accompanying the lease, "Please execute within 30 days. If
13 it's your choice not to lease this property, please make
14 arrangements to vacate."

15 Q Can you recall what the annual figure was
16 that you asked?

17 A I can't. It's been a while since I looked
18 at it. These things were sent, ignored, and they were
19 advised by Mayor Myers — again, this is third-party
20 information — not to sign. Join in, hop in the fight, and
21 let's go at it. I can't speak for them. I'm not going to
22 speak for the Mayor. I don't remember what the figures are
23 at this time.

24 Q Okay.

25 A That stuff is all available to you. It's in

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1 Q The right-of-way crosses, before coming up
2 from South Fork and before it gets to Creede, an area
3 that's owned by Hecla, H-E-C-L-A, Mining. Am I correct in
4 that regard?

5 A I believe that's correct. I know there was
6 some talk it was potentially going to change hands. I
7 would yield to the Mayor.

8 THE WITNESS: Has anything come of that?

9 MAYOR MYERS: Not at this point.

10 Q (By Mr. Allen) Situated on that area or
11 ground are what, mill tailings, something?

12 MR. MICKLEWRIGHT: Objection to the
13 foundation.

14 A I'm going to assume that's what's there. I
15 haven't analyzed it myself.

16 Q (By Mr. Allen) Was there any discussion or
17 any documentation between your foundation or you
18 individually and Union Pacific regarding potential
19 responsibility or designation of your foundation or Union
20 Pacific as a potential and responsible party for cleanup or
21 reclamation of that area where your right-of-way crosses?

22 A It would only be specific to our area and
23 Union Pacific identified that as a potential site and
24 passed the liability to us.

25 Q Are you acquainted either generally or

ANIMAS REPORTING SERVICE

1 specifically with what's called CERCLA?

2 A Yes.

3 Q Comprehensive Environmental Response,
4 Compensation and Liability Act?

5 A Yes.

6 Q Do you think one of the reasons that
7 institutions such as Union Pacific are receptive to sale
8 off of the last ten miles going into a mine is that, even
9 if they can't escape total potential liability under CERCLA
10 for cleanups that may be associated with that, they,
11 nevertheless, put somebody else out there such as your
12 foundation in the — if you will, the primary sights of
13 somebody such as the EPA or the Corps?

14 MR. MICKLEWRIGHT: Let me object to that on
15 the foundation or grounds. Is this a piece of property
16 that's in the city of Creede?

17 MR. ALLEN: Right next to the city of
18 Creede. Part of it is in the city of Creede.

19 MR. MICKLEWRIGHT: Okay. If you can, answer
20 that question based on what you think they might do.

21 A You're asking me to speak for the EPA?

22 Q (By Mr. Allen) No. I'm asking you to speak
23 for what communication you had from Union Pacific either
24 orally or in writing regarding potential responsibility if
25 that ever becomes an active cleanup area or if EPA or

ANIMAS REPORTING SERVICE

1 determination that, at this time, the site is stable and
2 has been stable for some time. And we're not going to come
3 through there with a railroad right-of-way in an invasive
4 manner. We're not going to create any major disturbance in
5 there. Certainly we need to rehabilitate the track to run
6 through there, but it's not like we're going to come in
7 there and do any earth moving. That's not in our game
8 plan.

9 I have the names of two individuals on my desk which
10 we were going to talk to and look for a bid from them to
11 come in and do some mapping so we know exactly what is
12 present within the right-of-way, within the track structure
13 itself, within 18 inches of the surface. And they're going
14 to do a mapping, and we can simply be indemnified from that
15 by virtue of the fact that they find nothing present of any
16 significance.

17 Q I saw a letter from EPA that said that —
18 no. I guess the Corps. That addressed Willow Creek where,
19 I guess, you've done some earth moving, and the Corps said
20 they did not think that what you had done required 404
21 permitting under the Clean Water Act.

22 A Right. All we simply did — in fact, I can
23 show you a picture in this book, and I think I showed you
24 that before. It may not have been on the record. I can
25 show you again.

ANIMAS REPORTING SERVICE

1 Corps, by Corps, I mean Corps of Engineers, desired to take
2 an aggressive stance in saying this has to be cleaned up
3 and goes out after PRPs and says to them, "You got to
4 contribute"?

5 MR. MICKLEWRIGHT: Objection. Relevance.

6 A I'm aware of the site. I've met with Zeke
7 Ward and talked to Zeke Ward on a number of occasions.

8 Q (By Mr. Allen) Who's Zeke Ward?

9 A He is the chairperson of the Willow Creek
10 Reclamation Committee. And I have spoken with Union
11 Pacific on the matter. We have looked at documents
12 pertinent to this. It is not at this time, and I was
13 advised that it was not going to become an EPA Super Fund
14 site. Do I have assurances and guarantees that that would
15 be the case from now until doomsday? No, we don't have
16 that, but we were willing to forego the information and go
17 ahead and consummate the purchase.

18 Q Have you had communications with either EPA
19 or the Corps of Engineers about clean-up responsibilities
20 or contamination or anything of that nature relating to
21 anywhere that the Foundation right-of-way crosses or is in
22 contact with either the mine tailings or any other toxic
23 discharge issues?

24 A I've spoken with a number of people at
25 various agencies regarding this situation; and it is their

ANIMAS REPORTING SERVICE

1 Q No. That's okay.

2 A It was a simple, small, little area with a
3 quasi crossing, if you will, an area that was simply filled
4 in with material. And we were informed that the material
5 that was brought in for that crossing was clean and tested
6 prior to its placement, but an area where they put fill
7 across the tracks so earth-moving equipment could move over
8 there and access the mine tailings to place the cap upon
9 it, and we simply removed that material that blocked our
10 free and unrestricted movement of our maintenance
11 equipment.

12 Q The right-of-way intersects both Willow
13 Creek and the Rio Grande River at numerous points, right?

14 A It intersects Willow Creek at one point and
15 we cross the Rio Grande at three points.

16 Q Okay. Are these crossing points within the
17 city of Creede?

18 A I think the Willow Creek, the little bridge
19 there may be within the confines of the city limits. Other
20 than that, none of the Rio Grande River crossings are in
21 the city of Creede.

22 MR. MICKLEWRIGHT: I'll object to questions
23 that address —

24 MR. ALLEN: I think all this goes to what
25 the potential cost parameters are. You recall the

ANIMAS REPORTING SERVICE

1 magistrate said — Judge Shaffer said I could inquire what
2 it's going to take to get the railroad operational.

3 Q (By Mr. Allen) The next question is
4 bridges.

5 A We discussed that at our last deposition.

6 Q I think you said that you don't have any
7 engineering — consulting engineer studies on the cost of
8 that?

9 A Rehabbing the bridges? Not at this time.

10 Q And I noticed looking through your files
11 this morning, Union Pacific has an entry that identifies, I
12 think, five bridges, all of which were built between 1900
13 and 1910?

14 A Uh-huh, 11. Yes, sir.

15 Q Have you had any discussions with either the
16 Corps or EPA about clean water permits, that you would need
17 404 permits or you can operate under an issue permitting
18 system to do work on the bridges? I assume, you can't do
19 work on the bridges without getting into the water?

20 A As a matter of fact, the investigator from
21 the Corps of Engineers that came out to investigate
22 complaints that are levied against our foundation by the
23 city of Creede regarding dirt movement within the confines
24 of the Willow Creek reclamation area, that lady came out,
25 she spent nine hours to do this, three and a half each way,

ANIMAS REPORTING SERVICE

1 program. It calls for specific gear to be worn, eye
2 protection, hard hats.

3 Q Steel-toed shoes?

4 A One-inch defined heel. Reflector material
5 on our vests, 105 square inch, etc., etc., etc. So we
6 remain in compliance. We do have an active safety program,
7 and anyone that wants to come out and work as a volunteer
8 goes through a small indoctrination and seminar, if you
9 will, on what the requirements are so they are properly
10 informed.

11 Q How much money does the Foundation need
12 between now and a date when it is operational for the
13 freight rail service to get to operational freight rail
14 service?

15 A I don't have that figure in front of me.

16 Q Do you have such a figure?

17 A Not at this moment because, as I stated
18 previously in my last deposition, so much of the costs that
19 we thought were going to be significant turned out to be
20 minimal by virtue of the availability of equipment through
21 donation, through auctions, pennies on the dollar. It's
22 dramatically reducing our rehabilitation costs and so the
23 figures are all skewed so we don't have an exact
24 approximation on that or even a cursory approximation on
25 that.

ANIMAS REPORTING SERVICE

1 two hours on site.

2 It was her opinion to myself that we had done
3 absolutely nothing wrong out there. We weren't even
4 remotely close to the historic high water mark, the 100 or
5 500 earmark. And she said, "In the future, if you need any
6 assistance in obtaining 404 permits for whatever work you
7 may need to do within the channel or along the edge, they
8 will be done in the most expeditious manner." She would
9 see to it.

10 Q But she did advert to the possibility that
11 you might need 404 permits to get into the —

12 A We might. Some area where it's simple
13 maintenance of the right-of-way, etc., no. Depending how
14 invasive we are within the channel itself, yes.

15 Q Do you have any OSHA compliance issues?

16 A Not at this time.

17 Q I take it, you will if and when you start
18 hiring people in any significant numbers?

19 A Uh-huh.

20 Q What about the volunteers that work out
21 there on your right-of-way? What workplace protections are
22 they required to have or do you impose or practice?

23 A We have a safety program that is in place.

24 Problems with volunteers out there on the line have been
25 minimal by virtue of the fact that we do have a safety

ANIMAS REPORTING SERVICE

1 Q Other than yourself and Leslie Parsley, has
2 anyone else worked on fund-raising for the Foundation?

3 A Matt has, I believe.

4 Q You're gesturing to Matt Codder, who is here
5 with us?

6 A Cutter.

7 Q Cutter. Sorry.

8 A Yes.

9 Q Have you as the Foundation ever prepared a
10 prospectus or brochure or anything of that nature to
11 present to a potential funding source?

12 A Asked and answered at the last deposition,
13 but I'll certainly answer it again. We have worked out a
14 number of different formats of data and brochures
15 available. They have been a work-in-progress; and as the
16 nature and complexity of this project has changed, so have
17 they. We don't have a current flyer at the moment, but
18 we've been working on one that's going to be available
19 soon.

20 Q Is there a draft of such a document now?

21 A I believe there is.

22 MR. ALLEN: Ray, I'd like to request that.
23 It would be subject to the confidentiality restriction.
24 Okay. I want to take about five minutes to confer with
25 Mayor Myers and I think I'm finished, but I don't want to

ANIMAS REPORTING SERVICE

1 wrap it until I know that for sure.
 2 (Recess is taken.)
 3 Q (By Mr. Allen) In going through your
 4 corporate stuff, I noticed a filing somewhere that
 5 identified four or five people as your corporate board
 6 members?
 7 A Yes.
 8 Q And I can't recall their names. Who are
 9 your board members?
 10 A At this moment?
 11 Q Yes.
 12 A Myself, Robert Shank.
 13 Q That's your --
 14 A Brother.
 15 Q Does he live in Durango?
 16 A No. Tennessee. Richard Millard.
 17 Q Millard?
 18 A And we had the resignation of William
 19 Colley. Dr. Martin Piernock and Robert Graham.
 20 Q Wasn't your former wife at one time a board
 21 member?
 22 A In the very early stages of this, but the
 23 IRS, while we were getting our nonprofit status, said we
 24 were family, and she dropped out.
 25 Q Does she still have any entitlements, if you

ANIMAS REPORTING SERVICE

1 Form 990 for the Foundation with the IRS for the year 2000?
 2 A That's correct.
 3 Q And that you thought you probably would not
 4 be required to?
 5 A We're not required to by virtue of the
 6 dollar requirement. We are going to do so as a courtesy.
 7 Q How much income did the Foundation have in
 8 2000?
 9 A I don't know. Denise would be the one you
 10 need to talk to on that. I don't remember the figure.
 11 Q You had about 500,000 in '99, right?
 12 A Something like that. Whatever is reflected
 13 on the 990s.
 14 Q Would 2000 be comparable?
 15 A No.
 16 Q When did 2000 start to tail off in terms of
 17 contributions or donations?
 18 A Right away.
 19 Q Why?
 20 A No, no. I say right away. I'm thinking
 21 2001. I don't recall exactly when it started tailing off.
 22 Q This lawsuit wasn't filed until early
 23 November of 2000, so this lawsuit can't have had much
 24 impact on the year 2000?
 25 A The negative stigma that got attached based

ANIMAS REPORTING SERVICE

1 will? Is she owed money?
 2 A Nothing.
 3 Q Is anybody out there other than you? I
 4 mean, you've provided the Foundation and taken some
 5 notes --
 6 A Yes.
 7 Q Is anybody else owed any money other than
 8 you?
 9 A Not other than some minor bills.
 10 Q I don't mean trade suppliers. I don't mean
 11 the phone bill.
 12 A No.
 13 Q Do you have an accountant?
 14 A We use DJ's Bookkeeping Service which is
 15 Denise Jackson.
 16 Q She's here in Durango?
 17 A She is. And we have also employed -- God.
 18 The name is right there. We're getting on in the
 19 afternoon. Give me a minute. Dennis Haley.
 20 Q He's a bookkeeper also?
 21 A Accountant. CPA. Firm of Haley, Breed and
 22 Crom.
 23 Q I think you said at one point, probably off
 24 the record, that you had not -- when we were looking
 25 through documents this morning, that you had not filed a

ANIMAS REPORTING SERVICE

1 on the repeated articles and statements by the mayor of
 2 being chained to the track and things of that nature,
 3 created a lot of unrest within the railroad community as to
 4 where this venture was going.
 5 Q Have you stopped chaining the mayor to the
 6 track?
 7 A No. It wasn't something we were going to
 8 do. This was something she volunteered herself. She said,
 9 "No train, no compromise." She said, "I'll chain myself to
 10 the track before I'll let a train come into Creede."
 11 THE WITNESS: Correct me if I'm wrong?
 12 MAYOR MYERS: No.
 13 Q (By Mr. Allen) "No train, no track. I'll
 14 chain myself to the track"?
 15 A It's a real shame that a municipality such
 16 as Creede won't let a business such as a charitable
 17 foundation at least a fighting chance to become operational
 18 in something that's always been there and is loaded with
 19 historic value.
 20 Q Have you seen Hugo Shopping in Silverton?
 21 A Yes. Have you?
 22 Q Yes.
 23 MR. ALLEN: I'm glad these people are in
 24 Silverton, not Telluride. I don't want a town full of
 25 T-shirt shops selling people ice cream cones.

ANIMAS REPORTING SERVICE

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 24 Silverton, not Telluride. I don't want a town full of
 25 T-shirt shops selling people ice cream cones.

ANIMAS REPORTING SERVICE

1 THE WITNESS: Silverton took a pretty dim
2 view of that statement that was made by BJ in another one
3 of her documents that she didn't want to become another
4 Silverton. Actually, Silverton sells a little bit more
5 than ice cream cones and T-shirts.

6 MR. ALLEN: Hamburgers and beer.

7 THE WITNESS: I'll be happy to put the city
8 manager of Silverton in contact with you, Mr. Allen. He
9 might have a different opinion on that.

10 MR. ALLEN: He might have a different
11 opinion, but I live in a town that does not have a tourist
12 train and does have a very high-end tourist clientele.

13 THE WITNESS: Well, I trust you're not
14 trying to equate Creede with Telluride.

15 MR. ALLEN: No. Creede doesn't have skiing
16 and Creede doesn't have anywhere near the size of the
17 valley that Telluride has, but I'm past apologizing for
18 what seem to be elitist attitudes.

19 If you have an economy like Telluride or Aspen or
20 Steamboat, people can earn a living, buy property and send
21 kids to college. And every time I pick up to the Silverton
22 newspaper, it's more -- my heart goes out to them. They're
23 remote. They're high. They have great difficulties. It's
24 what John Kenneth Galbreth said when I took economics from
25 him. It's GU, geographically undesirable. It's difficult,

ANIMAS REPORTING SERVICE

1 not having local support makes it very difficult to raise
2 money. You've acknowledged that?

3 A Uh-huh.

4 Q It's difficult to raise money because you
5 don't have local support?

6 A We have quite a bit of local support.

7 Unfortunately, the opposition is always far more vocal.

8 MR. ALLEN: I think that's all I

9 have, so we're done.

10 (Deposition concluded.)

ANIMAS REPORTING SERVICE

1 but an economy that's based on people coming in for two
2 hours a day and making retail purchases at that level is a
3 pretty distressed economy.

4 I don't know if they would be better off without the
5 train. Maybe not. Maybe they would have nothing. I can't
6 tell you, but I do know that there is a kind of Gresham's
7 Law that operated with regard to tourist -- Gresham's Law.
8 He's a Scottish economist of the 19th Century who wrote
9 that base metal drives out precious metal, and I think that
10 applies to tourism.

11 Once you've filled the town up with people looking
12 for lunch for \$6.95 and a souvenir, you've probably cut
13 yourself off from the people who are going to buy a
14 painting for \$2,000 or a piece of sculpture or come in and
15 build a three-million-dollar house. These are hard
16 choices. The trains are great for Durango. I don't think
17 it's great for Silverton. This is isn't a question. This
18 is trying to -- I don't know if you've seen the world
19 through this end of the kaleidoscope.

20 THE WITNESS: I think I've probably seen it
21 from every end of the kaleidoscope.

22 Q (By Mr. Allen) But it seems to me that,
23 generally speaking, grant making institutions, whether they
24 are government agencies or private foundations or whatever,
25 look for whether or not someone has local support and that

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SIGNATURE OF WITNESS

1
2
3 I, DONALD H. SHANK, hereby certify that I have read
4 the foregoing transcript of my deposition taken on the 3rd
5 day of August, 2001, and that I have listed all corrections
6 thereto on the following page herein. Except for said
7 corrections, it is a true and correct copy of my testimony
8 given on that day.

12 DONALD H. SHANK

14 STATE OF COLORADO }
15 COUNTY OF LA PLATA } ss.

16 Subscribed and sworn to before me this _____
17 day of _____, 2001.

19 Notary Public _____

20 My commission expires: _____
21
22
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25

ANIMAS REPORTING SERVICE

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1 STATE OF COLORADO) ss.
2 COUNTY OF LA PLATA)

3

4 I, CHRISTINA DISANTO, a Notary Public and
5 Certified Shorthand Reporter, DO HEREBY CERTIFY that I
6 did administer the oath to the witness herein prior to
7 the taking of this deposition; that I did thereafter
8 report in Stenographic Shorthand the questions and
9 answers set forth herein, and the foregoing is a true
10 and correct transcription of the proceedings had upon
11 the taking of this deposition.

12 I FURTHER CERTIFY that I am neither employed by
13 nor related to any of the parties or attorneys in this
14 case, and that I have no interest whatsoever in the
15 final disposition of this case in any court.

16 I FURTHER CERTIFY that I have retained the
17 Original Copy of the deposition to seal and deliver to
18 Mr. George Allen, Attorney at Law.

19

20 WITNESS MY HAND AND SEAL the ____ day of
21 August, 2001.

22

23

24 My Commission Expires: CHRISTINA DISANTO, C.S.R.
7/25/2005

25



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

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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.

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1 MR. ALLEN: Okay. Thank you. We, Mr. Mickelwright
2 and I, have agreed that if the Court orders that this is
3 going to proceed, it will be at 1 p.m. on Thursday of this
4 week. However, I would say this: For me to make travel
5 plans, it would be greatly helpful to have a ruling this
6 morning.

7 THE COURT: Well, I understand. But it's not much
8 of a hearing if Mr. Mickelwright can't participate in a
9 meaningful way.

10 MR. ALLEN: Right. I understand that, and I placed
11 the call, Your Honor, using my own telephone conference
12 capability, and if I need to get a conference call operator,
13 I'm happy to do that.

14 THE COURT: All right. Well, listen, Mr.
15 Michelwright, it's your motion for protective order. Tell
16 me anything you -- any additional information you want to
17 provide to me?

18 MR. MICKLEWRIGHT: (Poor connection and difficult
19 to hear) Let me tell you. Here are sort of seven things.
20 First, as the Court knows, Union Pacific owns the right-of-
21 way of the South Fork-Creed line.

22 THE COURT: Who's tapping?

23 MR. ALLEN: I am. I'll --

24 THE COURT: Stop.

25 MR. ALLEN: -- take you up with a pen.

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1 THE COURT: Good idea.

2 MR. MICKLEWRIGHT: Okay.

3 THE COURT: Go ahead, Mr. Micklewright.

4 MR. MICKLEWRIGHT: And that is sort of the status
5 quo. At some point in time, the Union Pacific thought it
6 would be financially advisable to abandon the Creed line.
7 And --

8 THE COURT: Right.

9 MR. MICKLEWRIGHT: -- it was required that they do
10 so pursuant to a specific statutory requirement.

11 THE COURT: Right.

12 MR. MICKLEWRIGHT: They filed their motion to
13 abandon. Shank and the Denver Rio Grande (inaudible word)
14 Historical Foundation submitted an offer of financial
15 assistance to obtain the Union Pacific's right -- (tape cut
16 out). Union Pacific, after protest by the City of Creed and
17 in competition with another potential purchaser, agreed to
18 sell its rights to Shank and the Denver Rio Grande
19 Historical Foundation.

20 When an offer of financial assistance is
21 ultimately approved by the Board of -- the Surface
22 Transportation Board, there are certain appellate rights to
23 those who have protested the acceptance and bona fides of
24 the offer of financial assistance. It requires, because
25 it's an administrative decision, that the appeal be taken

1 within 30 days. And the appeal or challenge to the OSA, if
2 there was a subsequent offer of financial assistance,
3 challenge needs to go to the Court of Appeals for the
4 district (inaudible-noise on tape) and the railroad resides
5 in this case in the Tenth Circuit.

6 Now, despite that, nothing has changed,
7 essentially, since the time the Union Pacific owned the
8 right-of-way and since my client agreed to assume financial
9 responsibility for it and purchase it. What has happened in
10 the meantime is I filed a motion for protective order and,
11 essentially, we agreed that, because it was important for
12 the City of Creed to conduct discovery for whatever reason
13 related to the issue of whether the right-of-way -- well,
14 it's regulated by the local zoning (inaudible), we agreed to
15 just -- we went through with a deposition.

16 Not only did we go through with a deposition,
17 sometime in June, I believe, but then in early August we
18 went through a second deposition of Mr. Shank. And at that
19 time, prior to the deposition, in order to facilitate the
20 exchange of information, we made available all the books and
21 records of the foundation and Mr. Shank relative to this
22 railroad right-of-way.

23 Mr. Allen came down with the mayor of the City of
24 Creed, went through it, and then we allowed them to conduct
25 the deposition again, during which time my client, Mr. Shank

1 and the Denver & Rio Grande Railroad Historical Society,
2 gave them all the information they needed but for,
3 essentially, how much money my client has in his wallet
4 today -- or at the time of the deposition.

5 And keep in mind that in this case there is no
6 issue of either compensatory or punitive damages. Even if
7 that were remotely a collateral issue in this case, it seems
8 to me that there isn't a rule whereby they would be entitled
9 to discovery of my client's current financial situation.

10 Now, all this comes back to this issue are they
11 trying to challenge the OSA collaterally through this
12 action. And the answer to that is yes. And so my client's
13 current financial situation is immaterial, it's irrelevant,
14 has not even the remotest relation to what's going on. And
15 if it were of interest to anyone, I suppose it would be of
16 interest to the Union Pacific to determine whether or not he
17 can make good on his contractual obligations with them. And
18 as far as I know, unless Mr. Allen knows otherwise, there is
19 no problem with the Union Pacific.

20 THE COURT: Well, let me stop you just for a
21 second. Let me --

22 MR. MICKLEWRIGHT: (Inaudible-continues speaking)

23 THE COURT: Mr. Micklewright, stop. Let me ask you
24 a quick question.

25 MR. MICKLEWRIGHT: Yes, sir.

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1 THE COURT: The -- you referred to your client's
2 contractual obligations to Union Pacific. Now, it's my
3 understanding that the entity or the individual that's made
4 a commitment is the foundation, is that correct?

5 MR. MICKLEWRIGHT: That's correct.

6 THE COURT: I mean, your client, Mr. Shrank, has
7 not made any written obligation. His -- any obligation he
8 has or -- is through the foundation, is that correct?

9 MR. MICKLEWRIGHT: Yes. I mean, it's sort of --
10 one step back. The foundation owes the Union Pacific and my
11 client has agreed to assist the foundation.

12 THE COURT: All right. And is that a written
13 agreement?

14 MR. MICKLEWRIGHT: Yes, it is. I believe it's
15 referred to, in fact, in the motion in opposition to the
16 protective order. And I think we've made that available.
17 My client's answered questions about that.

18 THE COURT: Okay. But to the extent that there is
19 any firm obligation, it's the obligation that the foundation
20 has to the railroad?

21 MR. MICKLEWRIGHT: Right. And those have been
22 disclosed.

23 THE COURT: Right. Okay. Go ahead, I'm sorry.

24 MR. MICKLEWRIGHT: And that's essentially it. In
25 addition, he has made available all his financial records

1 that were submitted in conjunction -- Mr. Shank personally,
2 in addition to the foundation, has provided all that
3 financial information to the plaintiff in this action.

4 And a couple of things: One is that when they went
5 through and looked at the documents on August 3rd, my
6 clients then made copies of those documents. We arranged to
7 have them given to -- hand-delivered to Mr. Allen when he
8 was in Denver last week and he didn't even come and pick
9 them up.

10 The second issue is that we have a scheduling
11 order despite the fact that I'm sort of being accused as the
12 person not complying with discovery. If you look at our
13 scheduling order, the mayor's deposition was scheduled to
14 take place on August 20th or the 21st -- I don't have that
15 right in front of me -- but despite repeated requests to get
16 that done, it hasn't taken place yet.

17 So I'm sort of at a loss. I think we've provided
18 all the financial material unless the Court sees that my
19 client -- Mr. Shank's personal current information is
20 relevant, I don't think there's any reason to provide it.
21 And I think more in line with the Court's orders we're
22 trying to allow them to have as much information as they are
23 entitled to, and then some. So that's all I have today.

24 THE COURT: Mr. Allen? Very briefly.

25 MR. ALLEN: Okay. First of all, you have in the

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1 package of materials attached to our opposition to the
2 protective order, Mr. Shank's \$400,000 guarantee of the
3 obligations of the foundation. So he's on a written
4 guarantee that was submitted to the Surface Transportation
5 Board.

6 We have a documentary record and it's before Your
7 Honor that the foundation is not current on its obligations
8 to the Union Pacific nor does it have assets with which --
9 or finances with which to either rehabilitate and restore or
10 operate this railroad bridge which brings his personal
11 guarantee into play.

12 He testified that the foundation does not have the
13 money to make the payment that was due to the Union Pacific
14 of several hundred thousand dollars on September 2nd of this
15 year, which we presume is now in default. And --

16 MR. MICKLEWRIGHT: Well, I don't think that's fair
17 to make that presumption.

18 MR. ALLEN: Ray, I didn't interrupt you and I'd
19 appreciate your not interrupting me. Okay.

20 MR. MICKLEWRIGHT: Sorry.

21 MR. ALLEN: Thank you. So on the record we have
22 there are no assets in the foundation with which to carry
23 out the things that the foundation and Mr. Shank said to
24 Judge Babcock they were doing to operate a railroad, which
25 Your Honor will recall is their defense.

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1 When we moved to remand this case to the state
2 court and said it didn't raise a federal question, they said
3 no, no, it does raise a federal question. The federal
4 question it raises is that we are operating a railroad line
5 or are about to do so, and, therefore, the whole issue of
6 whether or not there might be preemption by the STB makes it
7 a federal question. Judge Babcock agreed with that. That's
8 the law of the case.

9 The law of this case is there's a federal question
10 here by inference because the defense to this litigation is
11 this is an operating railroad subject to STB jurisdiction.
12 So they're the ones who put the whole issue of operating a
13 railroad into play. If it's not an operating railroad, then
14 we -- and let me take a short path into this Hobbs Act --

15 THE COURT: No, I don't -- Mr. Allen, I want it to
16 be very narrow in your discussion. Please.

17 MR. ALLEN: Okay. Let me be as tightly focused as
18 I can. The foundation has no ability on the record that we
19 have developed to operate this railroad. And in fact, the
20 material before you raises a substantial inference that its
21 initial submissions to the STB were fraudulent. It has a
22 financial statement submitted to the STB of hundreds of
23 thousands of dollars worth of collectibles and memorabilia
24 and Mr. Shank in his deposition -- and we excerpted that in
25 what's in front of you -- testified that the foundation has

1 never received those donations, does not have any written
2 document entitling it to receive those donations, and that
3 the donors have not delivered those donations, nor have they
4 taken tax deductions for them.

5 So there is every reason to believe that this
6 foundation, on the record that we have developed, has no
7 ability to operate a railroad. That brings Mr. Shank's
8 personal guarantee directly into play, and that's what we
9 were stonewalled on.

10 Every time I tried to inquire into his pre' -- and
11 he testified and said he could not -- on the day that we
12 took his deposition in Durango, which was August 1st of this
13 year, he could not write a \$4000,000 check to the foundation
14 to make the guarantee good.

15 THE COURT: Well, but I guess -- but I'm not sure
16 that's particular dispositive, Mr. Allen, because he had no
17 obligation to write the check on August 2nd.

18 MR. ALLEN: Well, this is --

19 THE COURT: The fact that he may not have the money
20 or he may not have the financial wherewithal to pay a check
21 on August 2nd, or whenever, all that means he may have
22 allocated his funds differently and he's going to cash in
23 his 401(k) or --

24 MR. ALLEN: Well --

25 THE COURT: -- sell securities.

1 MR. ALLEN: -- and that's what we tried to go
2 into. And given the record we had developed and we handed
3 him copies of collection cases where he was sued on his Visa
4 account and sued in collection cases within the past year or
5 two, we said, "Hey, we don't think you have an ability to do
6 this. And we want to inquire into how you are going to be
7 able to do that." He --

8 THE COURT: Well, stop. Mr. Allen, stop. Be quiet
9 and listen for a second. Now, let me ask a very simple --
10 let me ask two very simple questions.

11 Now, you would agree with me, Mr. Allen, that if
12 the foundation made the necessary payment on September 2nd,
13 then the financial guarantee hasn't been triggered?

14 MR. ALLEN: No, I don't agree with that. I mean,
15 the guarantee is --

16 THE COURT: But if the foundation is current in its
17 financial obligations, then there's no need to draw on the
18 guarantee. The guarantee only comes into play if the
19 foundation isn't current on its payments. Right?

20 MR. ALLEN: I'm not sure. That is a matter of
21 contract law between the foundation and Mr. Shank.

22 THE COURT: No, the bottom line is --

23 MR. ALLEN: It may be the foundation only meets the
24 guarantee. They may have a right to enforce the guarantee
25 whether they need that money or not.

1 THE COURT: No, but the bottom line is the
2 guarantee only becomes relevant if the foundation is --
3 doesn't have the financial wherewithal to pay its bills on
4 the day that the bill becomes due.

5 MR. ALLEN: I agree with you that if the foundation
6 were --

7 THE COURT: All right.

8 MR. ALLEN: -- making its payments and paid all
9 its obligations, and if it showed an ability to actually
10 rehabilitate and operate this railroad, because it doesn't
11 end with merely paying the Union Pacific.

12 THE COURT: But the obligations to run the railroad
13 only become -- they're not -- it doesn't necessarily have to
14 occur all at the same time. Now, my question is --

15 MR. ALLEN: Right. Right.

16 THE COURT: -- if there was a payment obligation
17 from the foundation to the Union Pacific on September 2nd,
18 it seems to me the first and most important question to ask
19 would be was that payment made.

20 MR. ALLEN: I agree with that.

21 THE COURT: Okay. Now, if that payment was made on
22 September 2nd so the foundation, vis-a-vis the railroad, is
23 current, then my question becomes: What relevance now does
24 Mr. Shank's financial condition have at all?

25 Because, Mr. Allen, I understand that you want to

1 pound the table, but I have reviewed your complaint in this
2 case, and your complaint, strictly speaking, doesn't address
3 Mr. Shank's financial condition. I'm also looking at the
4 motion to take his deposition which you filed on May 18th,
5 2001.

6 And in that motion on page 7 you state, quote, the
7 material we seek here is information regarding the affairs
8 of the defendant foundation and its plans, financial ability
9 and related material relating to whether it has any basis to
10 implement interstate freight rail shipments. If, as Creed
11 believes, the foundation has no such competence or resources
12 and if, as Creed believes, the oppressive real estate and
13 fund raising activities which the foundation is carrying on
14 are ends in themselves and unrelated to carriage of
15 interstate freight by rail, then as we demonstrate below,
16 Creed and its residents would appear to have a clear right
17 to seek relief from those activities in this forum, or to
18 seek from the Surface Transportation Board revocation of the
19 offer of financial assistance, which the foundation -- under
20 which the foundation is proceeding.

21 Now, my question is: If the foundation is current
22 on its September 2nd bill, then it seems to me the issue of
23 the guarantee hasn't been triggered because the foundation
24 doesn't need the guarantee.

25 So my question, Mr. Micklewright, to you -- and if

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1 you don't want to answer, that's fine -- has that September
2 2nd bill been paid?

3 MR. MICKLEWRIGHT: I can tell you it's either been
4 paid or the Union Pacific and the foundation have reached an
5 agreement for an extension.

6 THE COURT: Well, have they -- is that a verbal
7 agreement or is there some written understanding?

8 MR. MICKLEWRIGHT: I mean, I'd be happy to provide
9 a copy of that. I don't --

10 THE COURT: See, the question I've got, Mr. Allen,
11 is you want to explore Mr. Shank's personal finances. Well,
12 Mr. Shank's personal finances, strictly speaking, may not be
13 at issue yet. And you are entitled to take discovery of
14 nonprivileged information relevant to the claims or defenses
15 asserted.

16 And this is a lawsuit that seeks declaratory
17 relief. It is a lawsuit which seeks a judicial ruling that
18 the City of Creed zoning ordinance -- ordinances are
19 controlling. Now, I fail to see how Mr. Shank's financial
20 condition is relevant to the claim or defense raised in this
21 lawsuit. And in fact when you filed a motion for leave to
22 take Mr. Shank's depositions, your request was specifically
23 couched in terms of the finances of the foundation.

24 You are now seeking more than you ever sought
25 before. And at this point, until I know that that September

1 payment was not made, I fail to see the relevance of Mr.
2 Shank's personal assets.

3 MR. ALLEN: Judge, may I respond to that?

4 THE COURT: Sure.

5 MR. ALLEN: The heart of the foundation finances is
6 this guarantee. The STB in awarding the offer of financial
7 assistance rights based that award on the financial
8 representations made to it, and specifically referenced --
9 and I can't in the time available right now pull it up --
10 but the OFA award, which was made and which was contested,
11 not by Creed but by other parties, specifically referenced
12 this \$400,000 guarantee. So this \$400,000 guarantee is part
13 of the foundation's finances.

14 THE COURT: Well, but, you know, Mr. Allen, I'm
15 looking at a document dated May 30, 2000. It is the Service
16 Transportation Board's decision, STB Docket Number AB-33,
17 subpart number 132(s). United -- Union Pacific Railroad
18 Company Abandonment Exemption. In the Matter of: An Offer
19 of Financial Assistance, decided May 18, 2000.

20 On page 4 of this document, there's a heading
21 Financial Responsibility, and the STB decision reads as
22 follows: The city asserts that D&RGHF -- that's the
23 foundation -- is not financially responsible. Then it goes
24 on in the next paragraph: Whereas, here the finding is made
25 that an offeror is financially responsible to fund the

1 acquisition and operation of the line for two years, its
2 capability to conduct operations for two years is
3 customarily presumed in the absence of persuasive evidence
4 to the contrary.

5 It says here -- and then it goes on to say:
6 Moreover, the financial responsibility of the foundation is
7 not compromised by the fact that the purchase of the line is
8 being financed in part with borrowed funds. And then it
9 specifically rejected the city's claims to the contrary.

10 Now, my question is, at this point, you're
11 entitled to take discovery relevant to the claims or
12 defenses asserted. And I just don't see how Mr. Shrank's
13 personal wealth is relevant, and I particularly don't see
14 how it's relevant unless and until there's some showing that
15 the September 2nd payment wasn't made, and so, therefore,
16 the foundation is in arrears.

17 MR. ALLEN: Your Honor, let me try to deal with
18 this as best I can. First of all, the Hobbs Act only
19 forecloses with a 60-day statute of limitations, now 30
20 days, an appeal to the Tenth Circuit. That's 28 USC 2344.
21 The administrative law that's applicable to this is the
22 administrative law of the STB under which we're entitled as
23 the voters have said repeatedly and as the Supreme Court
24 refused to review in the Phillips case after the Tenth
25 Circuit said it, you can always file based on changed

1 circumstances or new evidence. Okay. So we're entitled to
2 STB determination.

3 These guys have said that they want this case to
4 go to the STB. We've said if it's going to the STB, we want
5 it to go on a fully formed record. Now, regardless of
6 whether they can continue to get the Union Pacific to roll
7 this date back indefinitely, which I guess they can do, I
8 don't -- you know, as far as I know, the September 2 payment
9 has not been made.

10 THE COURT: But you don't know what --

11 MR ALLEN: I think at a bare minimum I ought to be
12 able to take his deposition to ask that question.

13 THE COURT: Well, you should have taken his
14 deposition and you could have. You could propound your
15 written interrogatories.

16 MR. ALLEN: I took his deposition on August 3rd and
17 I asked him do you have the -- I asked him with regard to
18 both the foundation and Mr. Shank whether he had or expected
19 to have the ability to make that payment on September 2, and
20 I got negative answers on both of those.

21 Then when I tried to go into his ability to make
22 the guarantee good, I got stonewalled. So we're on a record
23 where I have to presume that if he had 2 million bucks
24 sitting somewhere, he'd have told us about it. But the
25 reason that we're not being given answers on this is that he

1 can't make it good, which is consistent with the fact that
2 he's being sued on his Visa account and he's got collection
3 cases going against him.

4 And I don't want to be in the STB, where I expect
5 we're going to be at some point in the next couple of
6 months, with a record in which these guys still don't have
7 -- are not operating the railroad. He's already testified
8 back in his June 21 deposition that he did not expect that
9 they would be in operation by Memorial Day 2002, which is
10 the two-year presumption period the STB gives him.

11 So we've already got his testimony that they don't
12 expect to operate within that two years. We got something
13 -- and I just learned in the last few days, and I haven't
14 been able to track it down, that there was a feasibility
15 study done for another prospective purchaser in 1993 which
16 put a price tag of rehab in this line at \$7 million in 1993
17 dollars.

18 So I think that this thing is preposterous. And
19 I think we're entitled to develop a factual record if we're
20 going to be in the STB which will not -- does not have the
21 capability and will not go out and send a hearing examiner
22 out or an administrative law judge. This is going to come
23 in on a referral from this district court. It's going to be
24 Judge Babcock's referral.

25 And we're entitled to have that referral based on

1 the fully formed factual record. And that goes to a lot of
2 issues beyond the mere issue of whether or not they can make
3 the payment to the Union Pacific. Even if they make the
4 payment to the Union Pacific, we would be entitled to
5 inquire into their ability to actually rehabilitate and
6 operate this railroad, because that's the representation
7 they made in saying there ought to be federal jurisdiction
8 is that they're running a railroad. That's their defense to
9 the zoning claim.

10 MR. MICKLEWRIGHT: No, that's incorrect, if I can
11 interject just a moment. Their claim is the city's zoning
12 regulations preempts federal law.

13 MR. ALLEN: No, we don't say that at all, Ray. You
14 know, if you're going to interrupt, I want you to be right.
15 And that our --

16 MR. MICKLEWRIGHT: (Inaudible-both speaking)

17 MR. ALLEN: -- contention -- Ray, please. Our
18 contention is that the zoning is applicable to non railroad
19 activities on the right-of-way and your claim is that the
20 federal jurisdiction under the STB is preemptive as to the
21 entire right-of-way.

22 MR. MICKLEWRIGHT: Okay. What does that have to do
23 with my client's financial situation currently?

24 MR. ALLEN: If he can't kick in the guarantee,
25 which is specifically tied to the payments to the Union

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1 Pacific, the guarantee says --

2 MR. MICKLEWRIGHT: That's a different issue --

3 MR. ALLEN: -- I pledge 400,000 to be utilized for
4 the acquisition of the right-of-way currently owned by the
5 Union Pacific. I think it's very material if they can't in
6 fact acquire the right-of-way.

7 MR. MICKLEWRIGHT: Well, the issue of law and the
8 applicability of federal law versus municipal law is what
9 you want to answer to. In the STB (inaudible-both speaking
10 simultaneously) --

11 THE COURT: Mr. Micklewright, speak up.

12 MR. MICKLEWRIGHT: -- (inaudible-both speaking)
13 it's the most logical place for that question to be answered
14 because that's exactly what they do. And I think you've
15 agreed to that.

16 MR. ALLEN: I don't understand. I --

17 MR. MICKLEWRIGHT: (Inaudible-both speaking).

18 MR. ALLEN: Ray, you're not making sense. I don't
19 even comprehend what you've just said.

20 MR. MICKLEWRIGHT: Well, you had an opportunity to
21 object to our motion to defer and -- (inaudible-both
22 speaking)

23 MR. ALLEN: To the STB and we said that we think
24 that there are probably legitimate STB issues but we have
25 issues to raise in the STB also.

1 MR. MICKLEWRIGHT: Okay.

2 MR. ALLEN: If it's go' -- and nobody has disagreed
3 with what I said which is that the STB procedure allows a
4 reopening or a review based on changed circumstances or new
5 evidence. Certainly evidence that this guy's guarantee is
6 worthless, which we believe it to be, is new evidence that
7 was not before the board when it made its May 2000 order.

8 MR. MICKLEWRIGHT: Well, it seems to me you have an
9 obligation to take that to the Tenth Circuit not to --

10 MR. ALLEN: No. We don't -- new evidence would
11 never be something that would be part of the initial appeal
12 from the initial order. If we didn't have that evidence on
13 May 30 and could not have reasonably been expected to have
14 it on May 30, then that would have been part of the appeal.
15 We're not talking about an appeal. That's why the Hobbs Act
16 is utterly irrelevant to this proceeding.

17 MR. MICKLEWRIGHT: No.

18 MR. ALLEN: You're the ones who wanted to invoke
19 the jurisdiction of the STB. What you want is the
20 jurisdiction of the STB on a record that's not fully formed,
21 and where you want to be able to say, oh, yeah, yeah, we're
22 still able to operate a railroad.

23 MR. MICKLEWRIGHT: Well, I will provide, Judge, the
24 information as the current status of the obligation.

25 THE COURT: Well, let me -- let me, guys -- let me

1 make just the observation that, frankly, I'm not sure either
2 side is acting properly. But what I am concerned about is
3 I'm trying to come up with a mechanism that will safeguard
4 Mr. Shank's privacy rights in his financial information,
5 whatever those privacy rights may be, but also give the
6 plaintiff a reasonable opportunity to conduct discovery.

7 And the difficulty that I have is to a certain
8 extent that I have to weigh these in a vacuum because I'm
9 not -- you're not going to bring this issue to me on
10 September 28th, and I can't sit here with absolute
11 confidence and say that under no set of circumstances will
12 this information be at all relevant.

13 So this is what I'm going to do: First of all, let
14 me make the observation that I think, Mr. Micklewright, when
15 you suspended his deposition, you suspended it improperly.
16 Rule 30 specifically provides -- Rule 30(d)(1) which you
17 refer to in your motion for protective order, it says that
18 a person may instruct a deponent not to answer only when
19 necessary to preserve a privilege -- and that's not being
20 asserted here -- to enforce a limitation directed by the
21 Court -- that's not being asserted here -- or to present a
22 motion under Rule 30(d)(4).

23 You have not asserted a motion in a timely manner
24 under Rule 30(d)(4). Rule 30(d)(4) says that any time
25 during a deposition on motion of a party and upon a showing

1 MR. ALLEN: Because I wanted current. When we go
2 in in front of Judge Babcock on Friday of this week, I want
3 to be absolutely current. That hearing is going to probably
4 form the basis for the referral to the STB. And, as I
5 understand it from Carl Morrell (phonetic), who is the
6 expert in STB law, with whom I'm consulting in Washington,
7 D.C., and who is my adversary in the Phillips litigation
8 over the Roaring Fork branch of the D&RG, the factual
9 structure that's submitted to the board in this 1336(b)
10 referral by the district court is what the board is going to
11 deal with.

12 THE COURT: Mr. -- Mr. --

13 MR. ALLEN: It's important we get the facts right.

14 THE COURT: Mr. Micklewright, the problem that I've
15 got is this: Your client on August whatever said that he
16 didn't have the financial wherewithal to comply with the
17 guarantee.

18 MR. MICKLEWRIGHT: Right.

19 THE COURT: Now, Mr. Allen's going to come waltzing
20 into court at the end of this week and he's gong to cite
21 that excerpt from the deposition to Judge Babcock.

22 MR. MICKLEWRIGHT: Right.

23 THE COURT: Now, if your client, either directly or
24 through you, stands up in court and says, "Well, no, Judge,
25 that's not true; we do have the ability to do it right now,"

1 why should Mr. Allen be saying that?

2 MR. MICKLEWRIGHT: We're not going to do that.

3 THE COURT: All right. So your client intends to
4 get up in court or you intend to represent to the Court on
5 the end of this month, this Friday, that your client does
6 not have the ability to honor the guarantee?

7 MR. MICKLEWRIGHT: That's correct.

8 THE COURT: All right. Then what more do you need,
9 Mr. Allen?

10 MR. ALLEN: That does it.

11 THE COURT: There you go. You don't need to take
12 this man's deposition because he's just stated in court as
13 an officer of the court that there has been no change in
14 circumstances, that Mr. Shank does not have the ability to
15 honor the guarantee today any more than he had last month,
16 and he doesn't have the ability and won't have the ability
17 at the end of this week. So, Mr. Allen, we've resolved your
18 problem, as I understand.

19 MR. ALLEN: Well, I think for what it's worth, Your
20 Honor, that we're entitled -- they're the ones who raised
21 STB jurisdiction, they're the ones who raised the
22 (inaudible-both speaking) --

23 THE COURT: Well, Mr. Allen --

24 MR. ALLEN: (Inaudible-both speaking) railroad
25 (inaudible-both speaking), I think we're entitled to inquire

1 into whether there's been fraudulent representation made.

2 THE COURT: No, no. Listen. The bottom line is he
3 tells you that right now, and certainly he didn't have it in
4 August, he doesn't have it now, and he won't have it this
5 Friday when you appear before Chief Judge Babcock the
6 financial ability to honor that guarantee.

7 And you've told me that that's what you were
8 concerned. I've just solved your problem for you.

9 MR. ALLEN: Well, I think we've solved part of the
10 problem.

11 THE COURT: Well --

12 MR. ALLEN: I agree with that. I think that we
13 ought to be entitled in this proceeding because this is, in
14 effect, the fact-finding arm of the STB's 1336(b) proceeding
15 to find out whether or not all these representations about
16 collectibles and all kinds of other stuff that relate --

17 THE COURT: See, now, Mr. Allen, you're shifting
18 targets. You came to me because you said you wanted to ask
19 questions about Mr. Shank's personal finances. I have
20 now told you that's no longer an issue. You're not
21 satisfied with that response, you now want to change the
22 playing field --

23 MR. ALLEN: No, I'll take what -- I'll be happy to
24 take what I've got. I don't want to be heard to be turning
25 it down.

1 THE COURT: No, but what I'm saying is you're also
2 being heard to want more than that. You filed a motion
3 saying you --

4 MR. ALLEN: Right.

5 THE COURT: -- wanted to depose him on his personal
6 finances. I just told you, based on the representations
7 made by Mr. Micklewright, you don't need that anymore.

8 MR. ALLEN: That's true.

9 THE COURT: Okay. So then basically your motion is,
10 as far as I'm concerned --

11 MR. ALLEN: It's moot based on what amounts to a
12 stipulation or a recommendation on the record that --

13 THE COURT: That's right. He doesn't have --

14 MR. ALLEN: -- (inaudible-both speaking). I'd
15 still like to know the status of what's happened with the
16 Union Pacific.

17 THE COURT: Well, that may be, Mr. Allen, but
18 you're not going to get it because you didn't put that in
19 your motion. It's that simple.

20 MR. ALLEN: Well, I could call up Mr. Obal
21 (phonetic) at the Union Pacific (inaudible) --

22 THE COURT: You can do whatever you want.

23 MR. ALLEN: -- (inaudible-both speaking) will tell
24 me.

25 THE COURT: You can do whatever you want consistent

1 with the Rules of Civil Procedure and the Code of
2 Professional Responsibility, but what I'm telling you is is
3 defendant moved for protective order to preclude a
4 deposition or a questioning of Mr. Shank on his personal
5 finances. You filed in opposition and said that it was
6 vitally important to you and your client to know whether or
7 not Mr. Shank had the financial wherewithal to perform under
8 the guarantee, because you were particularly concerned in
9 terms of, quote-unquote, making a record at the hearing on
10 September 28th.

11 MR. ALLEN: Correct.

12 THE COURT: Now, I have just -- you've gotten a
13 representation from Mr. Micklewright that Mr. Shank does not
14 today have the financial wherewithal to honor the guarantee
15 and will not have the financial wherewithal to honor the
16 guarantee as of September 28th. So you will be able to go
17 into Chief Judge Babcock's courtroom on September 28th and
18 make that factual representation. So the whole premise for
19 your concern to reopen the deposition is now moot.

20 THE COURT: Well, Your Honor, you'll recall I also
21 in the deposition notice, which is part of the proceedings
22 before you, also said that we wanted briefly to ascertain
23 the current status of matters touched on in prior deposition
24 testimony regarding --

25 THE COURT: No. The short answer to that is no.

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1 MR. ALLEN: Okay.

2 THE COURT: The short answer is you can represent
3 to the judge what the information in the deposition
4 revealed. You can advise the judge that -- the Court can
5 only operate under the most current information and this is
6 the most current information. And if Mr. Micklewright comes
7 in and makes representations and you think you're being
8 sandbagged, then you can advise the Court of that. I'm not
9 saying there's --

10 MR. ALLEN: As I understand it, Mr. Shank is going
11 to be there, and I suppose that, if Judge Babcock wants to,
12 he can put him under oath and asked him himself or
13 (inaudible).

14 THE COURT: Well, you can deal with Judge Babcock
15 on that question. I'm not going to presume to anticipate
16 how this thing's going to go. But at this point, I'm going
17 to grant the defendants' motion for protective order and
18 order that the deposition of Mr. Shank not be reopened based
19 upon the factual representations made by counsel on the
20 record to the effect that Mr. Shank does not now have the
21 financial wherewithal to honor the guarantee and does not
22 expect to have the financial wherewithal to honor the
23 guarantee as of September 28th.

24 Anything further?

25 MR. ALLEN: Let me just ask a housekeeping

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1 question. How do I go about getting the ruling that you've
2 just made transcribed most efficiently so that we shall have
3 it available when we see Judge Babcock?

4 THE COURT: As far as I'm concerned, you can order
5 a transcript from Avery.

6 MR. ALLEN: Avery is still doing it?

7 THE COURT: Yes.

8 MR. ALLEN: Okay. So talk with them?

9 THE COURT: Yes.

10 MR. ALLEN: Okay. That's great.

11 THE COURT: Anything else, Mr. Micklewright?

12 MR. MICKLEWRIGHT: No, sir.

13 THE COURT: All right. Thank you, gentlemen.

14 MR. ALLEN: Thank you, Judge.

15 (Whereupon, the within hearing was then in
16 conclusion at 9:10 a.m. on September 24, 2001.)

17
18 I hereby certify the foregoing is a correct transcript,
19 to the best of my knowledge and belief (pursuant to the
20 quality of the telephonic connection), from the record of
21 proceedings had in the above-entitled matter.

22

23

24

25

Shirley J. Woods
Signature of Transcriber

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1 THE COURT: Please be seated.

2 01-B-318, City of Creede vs. Denver & Rio Grande
3 Railway Historical Foundation and Donald Shank, defendants.

4 Counsel, would you enter your appearance, please.

5 MR. ALLEN: May it please the Court, George M. Allen
6 of Telluride, Colorado, on behalf of the City of Creede. With
7 me at counsel table, your Honor, I would like to introduce
8 B. J. Meyers, she is the mayor of Creede.

9 THE COURT: Thank you.

10 Mr. Micklewright.

11 MR. MICKLEWRIGHT: For the record, my name is Ray
12 Micklewright. Seated to my right is Mr. Shank, who appears
13 individually and as a representative of the Denver & Rio Grande
14 Railway Historical Foundation, who I shall refer to simply as
15 "the foundation."

16 THE COURT: As I understand it the pending motion is
17 to refer issues to the Surface Transportation Board and for a
18 stay pending resolution of those issues.

19 I think it's Mr. Micklewright's motion.

20 MR. MICKLEWRIGHT: That's correct.

21 THE COURT: I also understand that there is really no
22 dispute that the matter will at some juncture be or is already
23 referred to the STB. Is it now under referral?

24 MR. MICKLEWRIGHT: No, sir.

25 MR. ALLEN: No, your Honor.

1 THE COURT: But there is no dispute but that it should
2 be referred.

3 MR. ALLEN: Our view, your Honor, is that at some
4 point -- and I want to draw a distinction between the matter --

5 THE COURT: I understand. The issues -- well, go
6 ahead.

7 MR. ALLEN: Right. Our view is that this Court and I
8 think the 1336 law makes pretty clear retains plenary
9 jurisdiction of this case, but we agree that certain issues and
10 questions should be referred to the STB, because it has
11 exclusive jurisdiction of some of the issues in this case.

12 THE COURT: So the question is how you frame the
13 issues?

14 MR. ALLEN: Exactly.

15 THE COURT: And the question is whether or not we stay
16 discovery pending that referral.

17 MR. ALLEN: Exactly. Right. Let me inquire. Did the
18 Court receive the piece of paper I filed this morning?

19 THE COURT: I did. I read it.

20 MR. ALLEN: Okay. Well, I think that sets forth our
21 position.

22 THE COURT: And I think, Mr. Micklewright, you are the
23 party seeking the stay, so I'll go ahead and I'll take your
24 argument first.

25

DEFENDANTS' ARGUMENT

1
2 MR. MICKLEWRIGHT: When this case was originally filed
3 in Mineral County I was under the impression that in a sense
4 both the concerns of the foundation and Mr. Shank and the city
5 were aligned in some fashion, because each party had an
6 interest in determining the extent of both the municipal zoning
7 authority for the City of Creede and to the extent that that
8 authority might be preempted by federal law.

9 It seemed clear at the beginning that this was ripe
10 for a decision by the Surface Transportation Board, so our goal
11 was to have this matter in federal court and then have the
12 court under primary jurisdiction ultimately refer this matter
13 to the STB.

14 I believe that for the most part, despite the fact
15 that some of the discovery questions seem to go to the issue of
16 challenging the offer of financial assistance that my client
17 submitted to the Surface Transportation Board was ultimately
18 approved by the board and ultimately a deal was struck between
19 my client and the Union Pacific for acquisition of the line to
20 be abandoned.

21 On August 2d, I believe, I received during
22 Mr. Shank's -- or prior to Mr. Shank's deposition a brief from
23 the plaintiff that essentially said that, We want to be able to
24 take discovery in this case, because if we were to present the
25 issues that this case is really about, which are not zoning,

1 but are really addressed toward the offer of financial
2 assistance made by my client to the STB, they would generally
3 not get discovery. And I thought it was interesting that at
4 page 6 of the initial brief counsel noted that, "Generally the
5 board does not view these types of proceedings as adversarial.
6 As the board's predecessor, the ICC, pointed out in **Advantage**
7 **Tank Lines, Inc. vs. Ex-Pipeline Movements**, and that's
8 10 I.C.C. 2d 64, at page 66, a 1994 case: 'The purpose of a
9 declaratory order is simply to remove uncertainty as to the
10 legal effect of the fact pattern, as we understand it,
11 presented by the party requesting the declaration. It is not a
12 verification of those facts nor does it apply to any different
13 circumstances.'"

14 In the Case Management Order it is very clear what is
15 at issue in this case. It says, as follows:

16 "Plaintiff claims its 1972 residential zoning is
17 applicable to all of the former Denver & Rio Grande Western
18 Railroad right-of-way in that part of the City of Creede known
19 as South Creede except for the area occupied by the railroad
20 tracks themselves and a single side clearance extending 12.5
21 feet to either side of the centerline of the tracks. Thus,
22 Creede's claim is that except for a 25 foot wide strip on which
23 the tracks are centered, all of the foundation's right-of-way
24 in South Creede is subject to Creede's residential zoning."

25 Now what makes that somewhat complicated is the fact.

1 that none of the discovery has gone to the issue of zoning. It
2 has all gone to the offer of financial assistance.

3 Clearly that discovery and the purpose of this
4 litigation is then for what we would consider to be an improper
5 purpose.

6 First of all, I need to make several distinctions in
7 the procedural history of this case. Once Mr. Shank filed his
8 offer of financial assistance for consideration by the Surface
9 Transportation Board, they evaluated that information and made
10 a determination that it was bona fides, as it did with respect
11 to another offer of financial assistance for the same track.

12 What then happens is under 28 U.S.C. 2344 the parties
13 have a right to appeal from the administrative order of the
14 Surface Transportation Board. The plaintiffs from this action
15 did not file an appeal from that action, so whatever rights
16 they had to protest the bona fides finding of the offer of
17 financial assistance was lost. But all was not lost.

18 49 U.S.C. Section 722 provides for reconsideration of
19 board action. And simply all the plaintiff needed to do in
20 this case is to say that -- whatever their position is in this
21 case, which is that Mr. Shank's offer of financial assistance
22 is indeed not bona fides, present evidence to the board and let
23 them determine whether or not in a petition for rehearing they
24 are going to open and evaluate the matter.

25 Again, there are specific rules and regulations that

1 relate to that. 49 C.F.R. 1115.3 is the procedure and spells
2 out the proper forum for these attacks on the offer of
3 financial assistance, as does 49 C.F.R. 1115 -- excuse me,
4 1115.4. And that says when these petitions can be filed.

5 And the truth of the matter is these petitions can be
6 filed any time that the plaintiff in this case thinks there's
7 sufficient evidence to allow for an attack on the offer of
8 financial assistance.

9 THE COURT: You start with the proposition that I have
10 plenary jurisdiction.

11 MR. MICKLEWRIGHT: Yes.

12 THE COURT: And that petition can be filed at any time
13 that the plaintiff believes there is sufficient evidence to do
14 so?

15 MR. MICKLEWRIGHT: That's correct.

16 THE COURT: Doesn't that argue in favor of continuing
17 the discovery in this case at this time?

18 MR. MICKLEWRIGHT: No.

19 THE COURT: Why not?

20 MR. MICKLEWRIGHT: First of all, what does the Court
21 retain plenary jurisdiction over? And I believe the question
22 that the Court retains plenary jurisdiction over is the issues
23 that are framed by the Complaint. If the Complaint is as I
24 have articulated it from the Case Management Order, then it has
25 nothing to do with the offer of financial assistance --

1 THE COURT: Well, isn't there -- I mean the ultimate
2 issue for the city is a question of zoning authority,
3 regulatory authority of the city, correct?

4 MR. MICKLEWRIGHT: Correct.

5 THE COURT: And doesn't that implicate the extent of
6 any right-of-way that may inure to the benefit of the
7 defendants?

8 MR. MICKLEWRIGHT: Correct.

9 THE COURT: And doesn't that implicate the petition
10 that would be filed?

11 MR. MICKLEWRIGHT: Well, I think we need to sort out
12 different issues. The Union Pacific had a right to the
13 right-of-way that remained uncontested until it decided it
14 would abandon the rail line. To the extent that there were
15 zoning issues that needed to be addressed or could have been
16 addressed, they were not, for whatever reason. And, frankly,
17 the reason was that the Union Pacific didn't run the rail line.
18 When they decided to abandon it, my client decided that he had
19 an idea that what he could do was create a rail carrier for
20 freight. And fundamentally the city says, We don't want that
21 to happen.

22 So if you look at it from what the Court retains
23 plenary jurisdiction over, the first layer is what is the
24 friction between competing regulatory authorities, municipal
25 versus federal. The second is do we even want to look at in

1 the context of the dispute over who has regulatory authority to
2 do what, whether or not the financial offer of assistance was
3 bona fides.

4 Both the Surface Transportation Board and the Union
5 Pacific, who is ultimately going to be the beneficiary of this
6 contractual agreement between my client, are not unhappy with
7 it. Of what relevance then is it in this proceeding whether or
8 not the city is happy with that contractual arrangement?

9 THE COURT: Well, let me ask you this question: If
10 the offer was not a bona fide offer, then there may be no
11 right-of-way at all.

12 MR. MICKLEWRIGHT: Well, no. What happens then is
13 that the Union Pacific steps into the position of having to
14 make the determination whether or not it wants to retain its
15 rights or whether it wants to relinquish them through an
16 abandonment proceeding. So it takes the Union Pacific back to
17 square one. It doesn't mean that if --

18 THE COURT: But, you know, if it takes them back to
19 square one, and they decide to retain the rights, then that
20 returns to the status quo, right?

21 MR. MICKLEWRIGHT: Correct, correct.

22 THE COURT: And really that moots this case. If they
23 decide to abandon their rights, then the City of Creede has
24 jurisdiction to zone over that property?

25 MR. MICKLEWRIGHT: Well, I don't think that's

1 with that which he has agreed to accomplish.

2 Now if they just simply --

3 THE COURT: Well, your predicate there is that it is a
4 ruse, but an interest in zoning is a valid municipal interest.

5 MR. MICKLEWRIGHT: I agree. And not only do I agree
6 with that proposition, but I agree that there is a clash with
7 respect to the municipal regulatory authority and the federal
8 authority. And, frankly, who's best to handle that? Is it the
9 Surface Transportation Board? Yes, I think so.

10 THE COURT: And ultimately the question is what you
11 give them to handle it.

12 MR. MICKLEWRIGHT: Right.

13 THE COURT: And that's why we're here as to whether or
14 not there ought to be a stay of discovery.

15 MR. MICKLEWRIGHT: Right. And I'm saying that if
16 there is a procedure before the Surface Transportation Board to
17 attack the offer of financial assistance, then let them do that
18 with the Surface Transportation Board rather than running the
19 ruse of a zoning ordinance dispute through this litigation in
20 order to get discovery that they would not otherwise be
21 entitled to get under the Surface Transportation Board's
22 proceedings. Maybe they'll get it, maybe they won't. But I
23 think one of the things that the Surface Transportation Board
24 ought to be entitled to do is to defend its order that in fact
25 Mr. Shank's offer of financial assistance was bona fides. He

1 is not in default under the terms of that agreement with the
2 Union Pacific.

3 So essentially what we have then, if the Court retains
4 plenary jurisdiction and the plaintiff gets their way, is that
5 we have discovery going to the issue of my client's financial
6 ability to carry out the terms of the offer of financial
7 assistance and his agreement with the Union Pacific, when the
8 Surface Transportation Board itself may say, We don't think
9 that's a legitimate issue for us to have. One of the things
10 the Court could easily do is simply dismiss this action and say
11 to the plaintiffs, If you've got a concern about the offer of
12 financial assistance, then take it to the Surface
13 Transportation Board. The statute says -- or the regulation
14 says that you are entitled to bring this action any time as
15 long as you've got some legitimate evidence.

16 Now we have been more than cooperative with the
17 plaintiffs in this action with respect to discovery and making
18 information available that is wholly irrelevant to anything to
19 do with the zoning issues in dispute. So I think that the
20 issues that we framed in our June 12th submittal to the Court,
21 the two questions that we ask the Court to refer to the Surface
22 Transportation Board ought to be the ones that you submit.

23 Or I think the easier alternative possibility would be
24 to simply dismiss this action and let them proceed on the
25 merits of their claims that my client has somehow defrauded the

1 Surface Transportation Board in presenting his offer of
2 financial assistance to the Surface Transportation Board.

3 I don't think that's true. I don't think the Surface
4 Transportation Board will find that to be true. But at least
5 we ought to let them answer that question in the proper
6 mechanism that exists for the resolution of that kind of
7 dispute.

8 THE COURT: Okay.

9 Mr. Allen.

10 **PLAINTIFF'S ARGUMENT**

11 MR. ALLEN: Thank you, your Honor.

12 May it please the Court:

13 First, I'm bemused by Mr. Micklewright's statement
14 that they have been more than cooperative in making evidence
15 available. When Judge Ogborn was in a matter of hours of
16 ruling on our motion to take Mr. Shank's deposition in the
17 state court proceeding back in February, they removed it to
18 this Court, I presume to avoid that hearing, where I think the
19 outcome of the hearing was inevitable that we would have been
20 able to take Mr. Shank's deposition. We have taken his
21 deposition because we prevailed in motions before
22 Magistrate Judge Shaffer to take the deposition.

23 There has never been cooperation. And in fact we were
24 proceeding before Magistrate Judge Shaffer on Monday of this
25 week seeking further deposition testimony which they managed to

1 avoid only by stipulating that Mr. Shank is unable to perform
2 on his \$400,000 guarantee of the obligations of the foundation
3 to the Union Pacific for acquisition of the right-of-way.

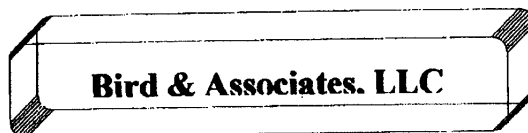
4 THE COURT: When is discovery scheduled to close?

5 MR. ALLEN: Discovery is scheduled to close per the
6 scheduling order, your Honor, on November 16. And that is a
7 time line that we can make based on the deposition notices that
8 I sent to Mr. Micklewright yesterday for several more
9 witnesses.

10 The only complicating factor in that, your Honor, is
11 that I'm scheduled to have both knees replaced with prostheses
12 in Aspen the week after next, and I'm assuming that I will
13 recover per the schedule my surgeon thinks I will.

14 I want to go back, if I may, your Honor, to this
15 Court's order denying remand. That's one I lost. I asked that
16 this case be remanded to the state court. Your Honor will
17 recall that your Honor found federal jurisdiction on the basis
18 of in effect inverting the posture of the parties and
19 determining that for purposes of federal jurisdiction in effect
20 the Court would look at this as though this had been a case
21 brought by the railroad foundation, Mr. Shank's foundation,
22 against the City of Creede to prevent Creede from using its
23 zoning to interfere with railroad operations. And the Court
24 found that if the case had been brought that way rather than as
25 a declaratory judgment proceeding, that there would have been

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1 unquestioned federal jurisdiction for that litigation. That
2 would have been in effect the same posture as, for example, the
3 Florida East Coast City of West Palm Beach case where the
4 railroad brought an action to try to determine that the city
5 zoning was being improperly applied to it.

6 If this case had been brought in that posture and the
7 Court determined federal jurisdiction and we did not disagree
8 with that, we said, All right, good enough, we'll proceed in
9 federal court and accept that there is federal jurisdiction, if
10 the Court had determined -- rather, if Mr. Shank and his
11 foundation had come into this Court and said, We're a railroad,
12 we have the right to be a railroad pursuant to this offer of
13 financial assistance which has been approved by the director of
14 the Surface Transportation Board, we without doubt would have
15 been entitled in our pleadings or by way of a 12(b)(6) motion
16 to say, No, you're not a railroad, and the reason we think
17 you're not a railroad is the following, which is in essence the
18 posture in which we now found ourselves: (1) You're not
19 operating trains. So in that regard you don't look like a
20 railroad. Furthermore, the right-of-way on which you claim to
21 be a railroad hasn't had any trains operating on it since 1985
22 and it hasn't had any trains operate to within the City of
23 Creede since 1972. So you are implausible in your contention
24 that you're a railroad.

25 Furthermore, we now know, based on what we have

1 developed in this case, that the foundation which made
2 representations to the STB -- and I'm holding in my hand the
3 STB decision of April 22, 1999, in which it specifically relied
4 on the financial representations of Mr. Shank and his
5 foundation.

6 They made representations regarding financial
7 capability to operate this railroad. Those were unchallenged
8 in that proceeding. I agree with Mr. Micklewright that there
9 is a framework within regulatory law for filing a challenge
10 with the STB as a matter of initial jurisdiction to the
11 continued OFA rights. I want to draw a distinction, however,
12 between that type of a challenge which the board would have
13 discretion to hear or not hear and the type of proceeding in
14 which we are now engaged. What we're talking about now is not
15 a matter on which the board will have any discretion. The
16 board in a 1336(b) referral from a district court has no
17 discretion not to hear it. They are in effect your servant.
18 And it will be your referral, it won't be Mr. Shank's referral
19 or my referral or my client's referral, it will be this
20 district Court's referral of questions or issues.

21 That will lead to in the proceedings of the board a
22 declaratory order proceeding, which as Mr. Micklewright
23 recognizes, citing the same case we cited in our initial filing
24 on the referral issue, the **Advantage Tank Lines** case, is one
25 where the Surface Transportation Board will take the facts as

1 in effect prescribed to it by the district court. The board
2 will not engage, according to **Advantage Tank Lines** and
3 according to the understanding which I referenced I had when I
4 conferred with the board's staff in Washington in May of this
5 year, the board isn't going to carry out fact finding in all
6 likelihood. I can't say never, because, who knows, maybe they
7 will. But as the lawyers with whom I've consulted in
8 Washington, who are more expert than I in these matters, point
9 out that once upon a time the Interstate Commerce Commission
10 had nearly a thousand administrative law examiners and hearing
11 examiners and the STB is now down to a handful of such slots.
12 So they're not really a fact-finding body. They will take the
13 facts as given to them by the district court and they will
14 conduct a 1336(b) determination or a determination pursuant to
15 the 1336(b) referral.

16 THE COURT: Does that require that I enter findings of
17 fact?

18 MR. ALLEN: Your Honor, I think we're in an area where
19 it doesn't require it, but it would be highly desirable,
20 because if you don't enter findings of fact -- what we've seen
21 here is we have a factually controverted matter. It's not as
22 though everybody agrees what the facts are. We take the
23 position that there is no financial ability to carry out the
24 responsibilities of operating this. And the foundation,
25 Mr. Shank says, Oh, no, it's much cheaper than you say it is --

1 district. That was Judge Weinshienk's in the Phillips case in
2 the Roaring Fork Valley. And in that case I learned to my
3 chagrin that by not having gotten the facts well formed before
4 having gotten to the STB, we became prisoners of an incomplete
5 record in the district court, which became the record in the --
6 rather, the ICC, which this was a pre-ICCTA case, the ICC
7 Termination Act of 1995. And my attempts in that litigation to
8 use the ICC, and then the STB came into being as that process
9 went on, were utterly fruitless. I was told, No, you know,
10 we're not interested in more affidavits, more findings, more
11 fact findings, carrying out discovery, sending a hearing
12 examiner, sending somebody out to investigate. It's very
13 interesting that you filed all these affidavits that say that
14 the rail line hasn't been used, and there are landslides, and
15 mudslides, and so forth. They just tossed it all out. They
16 said they didn't consider it. And that was that. So I learned
17 to my chagrin that you better use the district court to develop
18 the facts, because if you don't, you're not going to find a
19 receptive audience in Washington to doing a lot of fact
20 finding.

21 THE COURT: Yeah. The question I have in my mind is
22 how do you define -- develop the facts. I mean there's a
23 difference between developing information by way of, for
24 example, the deposition to submit to the STB and developing the
25 facts as adjudicated. And my concern is that latter step.

1 MR. ALLEN: I don't think we have to go to that latter
2 step. In a perfect world I would like to, but --

3 THE COURT: Yeah. I am reluctant to take it, that
4 latter step.

5 MR. ALLEN: I appreciate that. And I think we're
6 simply in a gray area. I don't think anything has defined what
7 these contours are. It's interesting, your Honor, that the
8 board in its **Borough of Riverdale** case, which is in the many
9 materials cited to you, which is a recent decision, that's
10 March of this year, in the **Riverdale** case cited with approval
11 the decision -- the initial decision of the District Court in
12 the West Palm Beach case. Now West Palm Beach is a case that
13 never went to the board. It's pending in the Eleventh Circuit
14 right now after the district court from the Southern District
15 of Florida found that a 21-acre concrete loading facility was
16 not integral to the operation of the Florida East Coast
17 Railroad and, therefore, the City of West Palm Beach could
18 apply its zoning and noise controls and so forth to this rather
19 large concrete loading facility.

20 So with due respect to everybody who has been writing
21 opinions, whether it be district courts, courts of appeal or
22 the board itself, I think the law is all over the place, and I
23 can't tell you where the -- where the contours are. I can tell
24 you where I would like them to be. But at a bare minimum what
25 seemed to me and to my client to be of very great importance is

1 to utilize the discovery window we have in this case and to
2 take the depositions that we have scheduled, those are as --
3 and we provided your Honor with a copy of the notice and I've
4 described it in our filing today, what we need to go into,
5 which is to get a determination -- or at least get facts on
6 which a determination could be made whether or not the
7 obtaining of the OFA rights is based on either
8 misrepresentation or fraud in what was submitted to the STB.

9 I want to say one more thing, and that is I view the
10 references to the Hobbs Act, 28 U.S.C. 2344, as a colossal red
11 herring. We're not talking here about something that had
12 anything to do with the rights of the City of Creede in the
13 initial OFA proceedings to take an appeal to the Tenth Circuit.
14 I mean, I agree, Creede would have had a right to appeal to the
15 Tenth Circuit, but the fact that Creede did not know at that
16 time and did not have means of knowing that the financial
17 representations and the competence representations that were
18 made to the board, and which the board accepted, both in its
19 April 1999 order and in its -- it's May 2000 order, the fact
20 that Creede didn't know that those representations were either
21 materially misleading or outright fraudulent does not deprive
22 Creede of the right to have an adjudication now that Creede is
23 in possession of these facts. And since we're in possession
24 and since we already have a record that tends to indicate in I
25 think a very substantial way that there's very substantial

1 doubt about the competence and ability of the foundation to
2 ever institute rail service -- I mean Mr. Shank's deposition
3 testimony on June 21 was that they would not have rail service
4 going by Memorial Day 2002. Memorial Day 2002 is the two-year
5 window by which the STB presumes by its regs and regulatory law
6 that there will be interstate rail service. The initial
7 abandonment exemption application filed by Union Pacific, which
8 contained an environmental assessment under NEPA, stated that
9 Union Pacific did not believe that there was any shipper demand
10 for rail service.

11 In Mr. Shank's June 21 deposition, he could not
12 describe a single shipper who had any need for rail service.
13 In the board's decision -- ultimate decision in the **Roaring**
14 **Fork** case in 1999 the board said that its procedures, meaning
15 specifically its OFA procedures, because that was an OFA
16 proceeding, cannot and should not be used to frustrate other
17 lawful operations of law.

18 Now the critical operation we're concerned with are
19 the reversionary rights that exist under 43 U.S.C. Section 912.
20 Under Section 912 Creede is a reversionary party. So unless --
21 if there's an abandonment, unless there's a rails-to-trails
22 conversion, which so far has not loomed on the horizon, Creede
23 stands to have the reversion. If that doesn't take place,
24 we're looking at having to deal with someone who even though
25 he's not operating a train, even though he doesn't look like

1 ever having any competence to engage in interstate carriage of
2 freight by rail, nevertheless stands to become the owner of 40
3 percent of the commercial real estate of the town of Creede
4 with enormous adverse impact on Creede.

5 The papers before the Court, your Honor, that have not
6 been challenged already show it has adversely impacted real
7 estate closings in Creede, adversely impacted business, people
8 have effectively had their titles clouded because of the
9 uncertainty that's generated by this circumstance.

10 So we're in very much the posture of mountain
11 communities that are confronted by people who want to come in
12 and get unpatented mining claims under the 1872 Act and use
13 those as a pretext for real estate development rather than
14 mining. We're looking at someone who wants to use OFA rights
15 purchased for a couple of hundred thousand dollars, with no
16 intent, no capability of ever operating freight rail service
17 and, frankly, based on what we see, very little prospect of
18 running a tourist train either, to go into the real estate
19 leasing business.

20 That is from Creede's point of view enormously
21 disruptive and anathema and it flies in the face of the rail
22 regulatory decision law that has come from both the ICC and the
23 board that construes the OFA proceedings and says, You can't
24 use these as a subterfuge to frustrate what would otherwise be
25 legitimate legal processes.

1 In the **King County** case, for example, which we cited,
2 up in Seattle where they did the OFA, then the day after they
3 did the OFA, they did a rails-to-trails conversion with the
4 right-of-way with no attempt to operate a railroad. The board
5 revoked those OFA rights and said, No, you can't do that. You
6 can't use the OFA process as a subterfuge to frustrate what
7 would otherwise be lawful processes.

8 What we want to do here, your Honor, at a minimum is
9 keep the discovery going through the discovery cutoff, which is
10 November 16. We've noticed depositions for the time period in
11 early to mid November.

12 And I will say this, Mr. Micklewright and I,
13 notwithstanding our disagreement on a lot of things, have had a
14 great working relationship on working out scheduling. He's a
15 consummate professional, and I really appreciate that. I hope
16 he would say the same of me.

17 We want to carry out discovery to get the information
18 established in order that when this matter goes to the STB, it
19 goes based on a record that's usable, because I don't think the
20 STB is going to develop a record.

21 THE COURT: Thank you.

22 MR. ALLEN: Thank you very much.

23 **RULING**

24 THE COURT: What I am going to do this: I am going to
25 deny the motion to stay discovery. We are on the eve of the

1 close of discovery. It seems to me that I begin with the
2 proposition that under this action as filed here, as clearly
3 pointed out by Mr. Micklewright, this Court has plenary
4 jurisdiction over this case. And the posture that the case now
5 exists is one that I think controls the analysis. Being
6 virtually on the eve of close of discovery, I think discovery
7 should proceed until completed.

8 Mr. Micklewright argues that this case is merely a
9 ruse to obtain that discovery. And I think that is advocacy to
10 utilize the word "ruse," but I think "ruse" in this case more
11 properly should be translated to a strategy, and it is an
12 appropriate strategy, given the plenary jurisdiction of this
13 Court, the case being as it is now postured before me.

14 Put it another way, with somewhat of a blunt
15 instrument: There's more than one way to skin a cat.

16 I am not of the view that it would be appropriate for
17 me to make findings of fact to resolve disputed issues of fact.
18 But the STB under the posture here, it being conceded that
19 there must be a referral of issues, will be required to make a
20 decision, and the decision is one which ultimately will aid in
21 the determination of the underlying merits of the case.

22 Now the question remains as to the definition of the
23 issues for referral. And I think at this point it is premature
24 to define those issues for referral. At the close of
25 discovery -- within 20 days from the close of discovery I am

1 going to direct that counsel file their statement of the issues
2 to be referred. One could hope that at least in some respect
3 those issues could be agreed, but I know that the devil is in
4 the details and that is not likely. However, what counsel can
5 do is make an effort so far as you can to define the issues for
6 referral. I think it would be possible for you to hone them so
7 that the issues could be stated in a way so that, for example,
8 in issue number one -- this is possible, I don't know that this
9 will occur, but there may be some alternate language contained
10 within an issue, although there's some agreed language within
11 it as well. So it's somewhat like I invite the submission of
12 instructions to the Court. What I ask for in an instruction,
13 if it is agreed, it simply comes to me. If there is language
14 in that instruction that is disputed, the plaintiff's language
15 appears in caps and the defendant's language appears in
16 brackets. Now if I see, for example, here an issue where there
17 is no caps and no brackets, I know that it is an agreed issue.
18 If I see an issue that is all in caps, I know that that's what
19 the plaintiff wants to refer and the defendant doesn't. If I
20 see an issue in which part of the language is in caps followed
21 by language in brackets, I know that the parties are submitting
22 alternative language to it. And I think you can structure
23 something along those lines for me.

24 So I will deny the motion for a stay. And we'll look
25 for your statement of issues for referral. And I think if you

27

1 want to supplement that by a ten-page memorandum in support of
2 your proposed language, I will permit that and entertain that
3 short memorandum brief.

4 All right. Anything further this afternoon?

5 Good thing they're not operating on your brain.

6 MR. ALLEN: You know, once you're under anesthesia,
7 you really don't know.

8 THE COURT: Well, good luck with your surgery.

9 All right. We'll be in recess.

10 MR. ALLEN: Thank you. I want to thank the Court for
11 scheduling this on Friday afternoon. I live on the Western
12 Slope and it's always easier to have them on Mondays and
13 Fridays. I don't know if that was deliberate.

14 THE COURT: Well, sure. You know, I used to practice
15 out in the country. I understand that.

16 We will be in recess.

17 (Proceedings concluded at 4:44 p.m.)

18

19

INDEX

20

Item

Page

21

Defendants' Argument

3

22

Plaintiff's Argument

12

23

Ruling

23

24

25

340

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

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Lewis T. Babcock, Chief Judge

JAMES R. MANDER, CLERK
Deputy Clerk

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

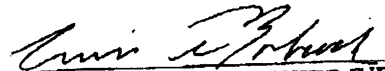
2. Within 20 days from the close of discovery, the parties SHALL FILE their

342

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



UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Honorable Robert Blackburn
United States District Judge

Honorable Craig B. Shaffer
United States Magistrate Judge

FILED
U.S. DISTRICT COURT
DISTRICT OF COLORADO

2002 MAR 27 AM 10:17

JAMES R. HANSPEAKER
CLERK

BY _____ DEP. CLK

CITY OF CREEDE,
a Colorado Municipal Corporation,

CIVIL ACTION NO. 01-RB-0318

Plaintiff,

-vs-

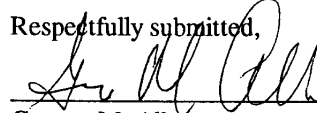
DENVER & RIO GRANDE RAILWAY
HISTORICAL FOUNDATION,
a Colorado Not-For-Profit Corporation
and DONALD H. SHANK,

Defendants.

**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. <i>Carmen Mehaffie</i> 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		
NOTICE OF ENTRY OF JUDGMENT		CASE NUMBER: BD 332896

You are notified that the following judgment was entered on (date):

1. ☒ 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.

on (date): MAY 10 2001

, California,
 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 <i>K. Smith</i> 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		
PETITION FOR ☒ Dissolution of Marriage ☐ Legal Separation ☐ Nullity of Marriage ☐ AMENDED		CASE NUMBER: BD332896

1. RESIDENCE (Dissolution only) ☒ 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 c. Period between marriage and separation
 b. Date of separation: 6-01-99 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. ☒ The minor children are:

Child's name	Birth date	Age	Sex
KRYSTIN JEAN SHANK	7-4-87	13 YRS	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. ☒ Petitioner requests confirmation as separate property assets and debts the items listed

☐ in Attachment 4 ☒ 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

COURT CASE TITLE

MARRIAGE of Shank

CASE NUMBER

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. | 5. District where petitioner resides. |
| 2. District where one or more of the parties reside. | 6. District where decedent resided. |
| 3. District where proposed ward/conservatee resides. | 7. Decedent resided out of state - held property in District. |
| 4. Child is held within the district. | 8. Child resides or decedent parent's probate would be filed in district. |

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 ☐ A5525 Summary Dissolution of Marriage ☐ A5530 Nullity of Void or Voidable Marriage ☐ A5510 Legal Separation ☐ A6135 Foreign Support Order ☐ A6136 Foreign Custody Order ☐ A6137 Reciprocal Enforcement of Support - Initiating Petition ☐ A6139 Reciprocal Enforcement of Support - Registration of Foreign Support ☐ A6122 Domestic Violence Restraining Order (Civil Harassment - use Civil Cover Sheet) ☐ A6600 Habeas Corpus Petition - Child Custody	1., 2. 1., 2. 1., 2. 1., 2. 1., 2. 1., 2., 4. 1. 1. 1., 2. 1., 4.
Other Family Case ☐ A6080 Determination of Parentage/Paternity (Non-governmental) ☐ A6111 Approval of Minor's Contract (6751 Family Code) ☐ A6130 Other Family Complaint or Petition (Specify): _____	1., 4., 8. 1. 1., 2., 4., 8.
Adoption Matters (Submit Central District Filings at Children's Court) ☐ A6101 Agency Adoption ☐ A6102 Independent Adoption ☐ A6103 Adult Adoption ☐ A6104 Stepparent Adoption	1., 5. 1., 5. 1., 5. 1., 5.

347

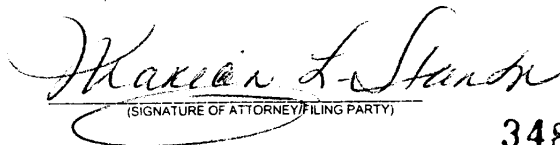
SHORT TITLE: <u>MARRIAGE of Shank</u>	CASE NUM. _____
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-1- Type of Action (Check only one)	-2- Applicable Reasons - See Above
Decedent Estates ☐ A6210 Petition for Probate of Will - Letters Testamentary ☐ A6211 Petition for Probate of Will - Letters of Administration ☐ A6212 Petition for Letters of Administration ☐ A6213 Petition for Letters of Special Administration ☐ A6214 Petition to Set Aside Small Estate (6602 Prob. Code) ☐ A6215 Spousal Property Petition ☐ A6216 Petition for Succession to Real Property ☐ A6217 Summary Probate (7660 Prob. Code) ☐ A6218 Petition re Real Property of Small Value (13200 Prob. Code)	1., 5., 6., 7. 1., 5., 6., 7. 1., 5., 6., 7. 1., 5., 6., 7. 1., 5., 6., 7. 1., 5., 6., 7. 1., 5., 6., 7. 1., 5., 6., 7.
Conservatorship/Guardianship/Trust Matters ☐ A6230 Petition for Conservatorship of Person and Estate ☐ A6231 Petition for Conservatorship of Person only ☐ A6232 Petition for Conservatorship of Estate only ☐ A6243 Petition for Conservatorship of Spouse who Lacks Capacity ☐ A6233 Petition for Approval of Medical Treatment without Consent ☐ A6240 Petition for Guardianship of Person and Estate ☐ A6241 Petition for Guardianship of Person only ☐ A6242 Petition for Guardianship of Estate only ☐ A6254 Trust Proceedings Petition	1., 3., 5. 1., 3., 5. 1., 3., 5. 1., 3., 5. 1., 3., 5. 1., 3., 5. 1., 3., 5. 1., 3., 5. 1., 5.
Other Probate Court Matters ☐ A6260 Petition for Compromise of Minor's Claim - no civil case filed (3500 Prob. Code) ☐ A6180 Petition to Establish Fact of Birth, Death or Marriage ☐ A6200 Other Probate Matter (Specify): _____	1., 5. 1., 5. 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 ☐ 1. ☒ 2. ☐ 3. ☐ 4. ☐ 5. ☐ 6. ☐ 7. ☐ 8.	ADDRESS: <u>6214 Watertree Ct.</u> <u>Agoura, CA 1. 91301</u>
CITY: <u>Agoura</u>	STATE: <u>Cal.</u> ZIP CODE: <u>91301</u>

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)


 (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
 Los Angeles, California 91436-4589

818-906-2877

FILED
 LOS ANGELES SUPERIOR COURT

OCT 18 2000

JOHN A. CLARKE, CLERK

K. Smith
 BY K. SMITH, DEPUTY

ATTORNEY FOR (Name): Gayle Ann Shank
 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**

- I am a party to this proceeding to determine custody of a child.
- ☐ 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.
- (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
KRISTIN 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
1996 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			
to			

349

- 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?

☒ 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?

☒ 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?

☒ 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)


(SIGNATURE OF DECLARANT)

7. ☒ Number of pages attached after this page: zero

350

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.

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address): MARIAN L. STANTON St. Bar #98007 STANTON LAW CORPORATION 6530 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 <i>Carmen Mehaffie</i> 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 ☒ Dissolution ☐ Legal separation ☐ Nullity ☐ Status only ☐ Reserving jurisdiction over termination of marital status ☐ Judgment on reserved issues Date marital status ends: <u>5/10/01</u>		
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: ☒ default or uncontested ☒ by declaration under Fam. Code, § 2336
☐ contested

- a. Date: 5/10/01 Dept.: 28 Rm.: 233
 b. Judicial officer (name): ☒ Temporary judge Wm DOBBS
 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
☒ Respondent was served with process ☐ Respondent appeared

4. THE COURT ORDERS, GOOD CAUSE APPEARING:

- a. ☒ Judgment of dissolution be entered. Marital status is terminated and the parties are restored to the status of unmarried persons
 (1) ☒ on the following date (specify): 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):
 g. ☐ Jurisdiction is reserved over all other issues and all present orders remain in effect except as provided below.
 h. ☒ 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)

1 **STIPULATED JUDGMENT OF DISSOLUTION**

2
3 The Court Orders as follows:

4
5 **SECTION 1: GENERAL INFORMATION**

6 **1.1 Factual Information.** The Court finds that the following information has
7 been set forth by the Parties:
8

9 The full legal name of Respondent is **DONALD HERBERT SHANK**. His mailing
10 address is 204 St. Andrews Circle, Durango, Colorado 81301. He is a citizen of the
11 United States and a resident, for tax purposes, of Colorado.
12

13 The full legal name of Petitioner is **GAYLE ANN SHANK**. Her mailing address is
14 6214 Watertree Court, Agoura, California 91301. She is a citizen of the United
15 States and a resident, for tax purposes, of California.
16

17 The Parties were married on October 26, 1985. The date of the Parties'
18 separation was **June 1, 1999 ("Separation Date")**.

19 The Parties have one minor child, **KRYSTIN JEAN SHANK (F)**, whose
20 *date of birth is July 4, 1987. (ad)*
21 **1.2 Agreement to Separate.** The Court finds that the Parties have agreed to

22 separate and live permanently apart. The purpose of this Stipulated Judgment is to
23 make a final and complete settlement of rights and obligations arising out of the
24 Parties' marriage, including their respective property rights and support rights. As
25 part of their agreement to separate, the parties acknowledge and represent that
26 they entered into a Marital Separation Agreement on June 1, 1999 and that the
27
28

1 within Stipulated Judgment of Dissolution is based upon that Agreement. At time of
2 entry of Judgment the parties agree to submit that Separation Agreement to the
3 Court as an Exhibit to the within Stipulated Judgment; however, the failure of the
4 Court to accept such attachment, shall in no way alter, modify or nullify any portion
5 of the within Stipulated Judgment of Dissolution.
6

7 **1.3 Proceedings.** This proceeding for dissolution of marriage between the Parties
8 was filed in the Superior Court of the State of California, County of Los Angeles,
9 Case Number BD 332896. The Petition was filed by Petitioner on October 18, 2000.
10 The Court acquired jurisdiction over Respondent on October 26, 2000.
11

12
13 **SECTION 2: PROPERTY SETTLEMENT AND CONFIRMATION OF SEPARATE**
14 **PROPERTY**
15

16 **2.1 A. Division of Community/Quasi and Community and Mixed Property**
17

18 **2.1.1 Property Specified.** The community/quasi community and mixed property of
19 the Parties is Ordered to be divided as follows:
20

21 **PROPERTY OF RESPONDENT FROM COMMUNITY OR MIXED PROPERTY.**

22 Respondent is awarded as his sole and separate property all of the following items:

- 23 1. All furniture, furnishings and appliances in Respondent's possession as of June 1,
24 1999;
25 2. Any interest that the community may have acquired in certain Colorado
26 properties known generally Highway 160 (raw/undeveloped land) and Airpark
27 Village in Durango, Colorado;
28

1 3. Any interest and obligation that the community may have acquired in a Ford
2 Explorer automobile leased by Respondent and returned at the end of the lease to
3 G.E. Capital Lease.
4

5 **PROPERTY OF PETITIONER FROM COMMUNITY OR MIXED PROPERTY.**

6 Petitioner is awarded as her sole and separate property all of the following items:
7

- 8 1. Any interest that the community may have acquired in the separate property
9 residence owned by the Petitioner prior to marriage and known generally as 6214
10 Watertree Court, Agoura, California 91301;
11 2. The proceeds from sale of a 1992 Ford Aerostar automobile traded in on a 2000
12 Ford Mustang;
13 3. All furniture, furnishings, appliances and artwork currently in Petitioner's
14 possession as of June 1, 1999.
15

16 2.1.2 **Settlement.** The Court finds that the division of property set forth in
17 Section 2.1.1 above represents an agreement of the Parties as to a division of the
18 community property and a settlement of all claims involving commingled or
19 contested separate property or for reimbursement by either Party. The Court finds
20 that the community debts of the Parties were taken into consideration in effecting
21 this division of the community property shall be without regard to value.
22

23 **2.1 B: Confirmation of Separate Property:**
24

25 **2.1.B.1: Separate Property Confirmed to Respondent:**
26

27 The following property is confirmed to Respondent as his sole and separate
28 property:

ins *[Signature]*

1 1) All right, title and interest in any business entity(is) to which Respondent
2 claims or has claimed an interest including all debts, liabilities, liens, claims,
3 whether choate or inchoate, causes of action or promissory obligations pertaining
4 to the interest in said entity(is), including, but not limited to all of the following
5 entities:
6

7 a. Denver & Rio Grande Railway (a Colorado corporation);

8 b. Rio Grande Southern Railroad Company LLC;

9 c. Donald Shank Enterprises;

10 d. Animas Airpark Development Associates LLC;

11 e. Partnership interest in Ludington Partners One;

12 2) All right, title and interest in that real property known generally as Highway 160
13 (titled in Ludington Partners One) and Airpark Village (titled in Animas Airpark
14 Development Associates LLC) in Durango, Colorado, including all debt, liability,
15 claims, whether choate or inchoate, causes of action or promissory obligations
16 pertaining to his interest in said entity(is);
17

18 3) All property, of whatever nature or kind, whether real or personal, acquired by
19 Respondent subsequent to June 1, 1999 including all debt, liability, claims, whether
20 choate or inchoate, causes of action or promissory obligations pertaining to his
21 interest in said entity(is);
22

23 4) All right, title and interest in a Ford Explorer leased and turned in to G.E. Capital
24 Leasing by the Respondent including, all debt, liability, claims, whether choate or
25 inchoate, causes of action or promissory obligations pertaining to his interest in
26 said vehicle.

27 5) \$6500.00 in ancient coins.

28 6) A 1996 F-250 Ford truck and outstanding loan balance with Ford Motor Credit in

1 the approximate amount of \$9,400.00.

2 **2.1.B.1: Separate Property Confirmed to Petitioner:**

3
4 The following property is confirmed to Petitioner as her sole and separate
5 property:

- 6 1) All right title and interest in the real property known generally as 6214 Watertree
7 Court, Agoura, California 91301 and all acknowledged debts/liabilities/mortgages
8 and liens relating thereto.
9 2) A life insurance policy insuring Petitioner's life (Farmers New World Life, policy
10 number 006025663Y)
11

12 **2.2 Allocation of Debts**

13
14 **2.2.1 Basic Allocation.** Unless specifically provided otherwise in this Judgment,
15 each Party is Ordered to be responsible for paying any and all obligations (whether
16 known or unknown to either Party) secured by property received by that Party
17 under the terms of this Judgment. Scheduled debts, liabilities, and obligations of
18 the Parties are Ordered to be paid as follows:
19

20 **Debts allocated to Respondent:**

21
22 Respondent is assigned the obligation to pay, appear and hold Petitioner
23 harmless from all debts awarded to him hereunder (including both community and
24 separate debt).
25

- 26 1. All credit card debts on any and all credit cards in the name of Respondent,
27 whether or not the charges were incurred prior to separation or subsequent to
28 separation.

1 2. The debt on a Bank of America Visa Account No.4024004697129639 which has
2 an approximate current outstanding balance of \$8,300.00. Respondent shall pay
3 the outstanding balance owed on this account as soon as possible, but in no event
4 later than (five) 5 days from the date that he receives proceeds from sale of any of
5 his real property.
6

7 3. All debts incurred by Respondent and in his name or his name and any third
8 party or entity at any time during marriage and at any time after separation.

9 4. **SEPARATE PROPERTY DEBT:** Respondent acknowledges and is assigned as his
10 sole and separate responsibility and shall appear and hold Petitioner harmless from
11 the following separate property debt pertaining to his separate property assets
12 and/or post-separation debts, including but not limited to the following debt:
13

14 a. A Conoco Gas Credit Card Debt (Account #26 408 9889)

15 which has a current outstanding balance of \$536.22;

16 b. First U.S.A. MasterCard (Account # 5546 0830 1094

17 5406) which has a current outstanding balance of

18 \$9,851.69;

19 c. First U.S.A. Visa (Account #4417 1223 7651 1391) which

20 has a current outstanding balance of \$6,520.27;

21 d. Capital One Visa (Account #4388 6413 1877 3335) which

22 has an outstanding balance of \$5,984.67;

23 e. William Lauer (Promissory Note) in principal amount of

24 \$20,000.00 (plus interest);

25 f. Robert McAtee, et al (Promissory Note) in principal amount

26 of \$10,000.00 (plus interest);
27
28

\$ yes *[Signature]*

- 1 g. Dorothy J. Shank (Promissory Note) in principal amount of
2 \$5,000.00 (plus interest);
3
4 h. Duane D. Danielson (Promissory Note) in the principal
5 amount \$18,897.00 (plus interest);
6
7 i. Pete Amass (unsecured debt) in the principal amount
8 of \$35,000.00 (plus interest);
9
10 j. 1st. National Bank of Durango (Note and Deed of Trust)
11 in the principal amount of \$240,000.00 (Respondent'
12 liability on this debt is 16.67%);
13
14 k. William Lauer (Note and Deed of Trust) in the principal
15 amount of \$157,134.00 (Respondent's liability on this debt
16 is 16.67%);
17
18 l. Robert McAtee (Note and Deed of Trust) in the principal
19 amount of \$31,428.00; (Respondent's liability on this debt
20 is 16.67%);
21
22 m. Rodney Ludington (Respondent's liability on this debt is
23 16.67%).
24
25 n. Rocky Mountain Escrow (Note and Deed of Trust) in
26 principal amount of \$112,000.00. (Respondent's liability
27 on this debt is 50%).
28
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

EXOS 

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.

1 Those debts, obligations, and liabilities known to both Parties and incurred prior to
2 the Separation Date (and not otherwise specifically assigned to a Party under this
3 Judgment), shall be paid by the Party or Parties responsible for incurring the debt.
4 Except as otherwise provided in this Judgment, any debt or claim against the
5 Parties, unknown to one or both Parties and incurred prior to the Separation Date,
6 shall be the responsibility of the Party or Parties incurring the debt. Unless
7 specifically provided otherwise in this Judgment, debts, known or unknown,
8 incurred after the Separation Date are Ordered to be paid by the Party incurring the
9 debt.
10

11
12 2.2.2 **Credit Card Accounts.** All existing charge and credit accounts in the name
13 of Respondent and Petitioner, or in the name of either Party, under which the other
14 can make purchases or secure credit, other than the above referenced Bank of
15 America Visa and Mobil credit cards shall immediately be closed or changed to the
16 name of the Party retaining that account without recourse against the other Party.
17 Any outstanding indebtedness on these accounts, not otherwise specifically
18 scheduled to be paid by one Party, is Ordered to be paid by the Party incurring the
19 debt, notwithstanding the general allocation of debts provided above.
20

21 2.2.3 **Claims by Third Parties.** Except as set forth in this Judgment, the Court
22 finds that each Party warrants that he or she has not incurred, and each is Ordered
23 not to incur, any liability or obligation on which the other may be liable. The Court
24 Orders that if any claim, action, or proceeding shall be brought seeking to hold the
25 other liable on account of any such liability, obligation, act, or omission (other than
26 those incurred for the support and maintenance of a Party or a minor child for
27 which a Party may become liable under this Judgment or under any order of a court
28

1 of competent jurisdiction), the obligated Party shall, at his or her sole expense,
2 defend the other Party against any such claim, liability, or obligation (whether or
3 not well founded) and shall hold the other Party free and harmless from it. This
4 indemnification shall include any costs, including attorney's fees, reasonably
5 incurred by the other Party in defending any claim made against him or her. The
6 Court finds that the Parties understand that any orders contained in this Judgment
7 for one Party to assume the obligation of the community or post-separation debts
8 of the other Party may not be binding on creditors and that a creditor may have
9 rights to seek payment against either Party. The Court further finds that the
10 Parties understand that their obligations to each other, and to third-party creditors,
11 are subject to possible discharge in bankruptcy.
12
13
14

15 **SECTION 3: FAMILY RESIDENCE.** The Parties have used as their family home
16 the residence at 6214 Watertree Court, Agoura, California 91301 (the "Residence").
17 The Residence includes all improvements, appurtenant structures, grounds, and
18 easements. The Court finds that the Residence is the separate property of
19 Petitioner, purchased by Petitioner in her own name prior to marriage. The parties'
20 acknowledge and warrant that at no time was title ever transferred to the parties
21 jointly or as community property. The parties acknowledge that in connection with
22 Petitioner's earlier refinancing of said residence, Respondent executed a Quit Claim
23 Deed in favor of Petitioner and that said Quit Claim remains in full force and effect.
24 If necessary or required and at Petitioner's request, Respondent is Ordered to
25 execute and deliver to Petitioner a quitclaim deed in a form suitable for recordation
26 confirming that Respondent has no interest in the Residence.
27
28

1 **SECTION 4: SPOUSAL SUPPORT.** The Court finds that Respondent and
2 Petitioner have waived any right to current spousal support. No court shall have
3 jurisdiction to order spousal support for either Party at any time. Notwithstanding
4 any other Sections in this Judgment, no court shall have the ability to extend its
5 jurisdiction over support beyond the time set for jurisdiction to end, as provided
6 above, regardless of when a Party may bring a motion to do so and irrespective of
7 any change in economic or other circumstances of the Parties. The Court finds that
8 the Parties understand that when a court has no jurisdiction over support, no
9 support can be ordered regardless of the hardship that this might cause. The Court
10 finds that the Parties have carefully bargained for the absence of support as
11 provided in this Judgment, and the provisions of this Section are intended to
12 comply with the requirements of In re Marriage of Vomacka (1984) 36 Cal.3d 459,
13 and In re Marriage of Brown (1995) 35 Cal.App.4th 785, to make clear that no
14 court shall have authority to provide for support of any amount at any time.
15
16

17
18 **SECTION 5: CHILD SUPPORT.**
19

20 1) **Direct Support:** Based on the following financial factors, Respondent shall
21 pay to the Petitioner as and for child support the sum of \$66.00 per month payable
22 one half on the first and one-half on the fifteenth day of each month commencing
23 November 1, 2000 and continuing until the minor child reaches the age of majority,
24 dies, marries, becomes emancipated or reaches the age of 19 years and is still
25 enrolled full-time in high school or further order of court whichever first occurs.
26

27 Petitioner's Gross Monthly Income: \$7,000.00

28 Respondent's Gross Monthly Income: 1,000.00

3/2005 *AK*

1 Petitioner's Custodial Time: 80%
2 Respondent's Custodial Time: 20%
3 Petitioner's Medical Ins. Costs for Child \$300.00
4 Petitioner's Tax Filing: Head of Household: 2
5 Respondent's Tax Filing: Single: 1
6

7 The Court finds that the Parties acknowledge, pursuant to Family Code section
8 4065, that: (i) they are fully informed of their rights concerning child support; (ii)
9 they have agreed to the child support provisions of this Judgment without coercion
10 or duress; (iii) this Judgment is in the best interests of the child involved; (iv) the
11 needs of the child will be adequately met by this agreed-upon arrangement; and
12 (v) they have not assigned the right to support to the county and no public
13 assistance application is pending.
14

15 2) **Medical/Health Expenses:** Petitioner shall maintain her current
16 health/medical policy of insurance for the minor child (or a comparable one at a
17 reasonable price). Each party shall pay one half of the uncovered/uninsured
18 medical, dental, psychological, optical, orthodontia and health related expenses of
19 the minor child.
20
21

22
23 **SECTION 6: CHILD CUSTODY**

24 **6.1 Custody.** The Parties have one minor child, **KRYSTIN JEAN SHANK** (born
25 June 4, 1987). Legal custody of the minor child is Ordered to be with Petitioner
26 under Family Code section 3006. "Sole Legal Custody" under Section 3006 "means
27 that one parent shall have the right and the responsibility to make the decisions
28

File 

1 relating to the health, education, and welfare of a child." Physical custody of the
2 minor child of the Parties is Ordered to be with Petitioner under Family Code section
3 3007. "Sole Physical Custody" under Section 3007 "means that a child shall reside
4 with and be under the supervision of one parent, subject to the power of the court
5 to order visitation."
6

7
8 **SECTION 7: RELEASES, WARRANTIES, WAIVERS**
9

10 **7.1 Warranty re Undisclosed Gifts.** The Court finds that each Party warrants
11 that he or she has not made, without the consent of the other, any gift or transfer
12 of the Parties' community or quasi-community property to any single person or
13 entity exceeding a cumulative total of Five Hundred Dollars (\$500) (other than a
14 transfer in exchange for fair and reasonable consideration to the community or a
15 family gift known to the other Party).
16

17 **7.2 Division of Undisclosed Property.** If a court of competent jurisdiction shall
18 later determine that either Party is now possessed of any community or quasi-
19 community property not set forth in this Judgment, or that one Party has made,
20 without the consent of the other, any gift or transfer of the Parties' community or
21 quasi-community property to any single person or entity exceeding a cumulative
22 total of Five Hundred Dollars (\$500) (other than a transfer in exchange for fair and
23 reasonable consideration to the community or a family gift known to the other
24 Party), then the Party at fault is Ordered to transfer or pay to the other, at the
25 other's election, (i) the other's share of the property, if it is reasonably susceptible
26 of division, (ii) the full market value of the other's interest on the Effective Date of
27
28

1 this Judgment, or (iii) the full market value of the other's interest at the time the
2 other Party discovers the gift or the ownership of the property. Nothing contained
3 in this subsection shall limit any other remedies available at law for undisclosed
4 property, including the Court's discretion to make an unequal division of any
5 intentionally or negligently omitted assets pursuant to Family Code section 2556.
6

7 **7.3 Warranty of Full Disclosure.** The Court finds that each Party warrants that
8 he or she has made a full and accurate disclosure to the other pursuant to Family
9 Code section 2100 of all assets, liabilities, and encumbrances, and their values, in
10 which one or both Parties have or may have an interest, and each has made a full
11 and accurate disclosure of his or her income. The Court finds that the Parties
12 warrant that they have met their duty pursuant to Family Code section 2100 to
13 update and augment that information including advising the other of any material
14 facts that could substantially affect the value of any asset up until the time of this
15 Judgment.
16

17
18 **7.4 Property Acquired After Separation.** Any property acquired by either Party
19 after the Separation Date shall be the sole and separate property of the Party
20 acquiring it. The Court finds that each Party waives any property rights in or to any
21 future acquisitions of property by the other.
22

23 **7.5 Review of Insurance Policies and Retirement Plans.** The Court finds that
24 the Parties are aware of Family Code section 2024 advising parties to a dissolution
25 of marriage to review their wills, insurance policies, retirement benefit plans, credit
26 cards, credit accounts, credit reports, and other matters that they may wish to
27 change. The Parties are advised to review all property rights and employment
28

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.

1 **7.8 Waiver of Discovery Rights.** The Court finds that the Parties understand
2 that they have a right to discovery, which includes taking depositions, submitting
3 interrogatories, obtaining documents, requesting admissions, using subpoenas, and
4 obtaining appraisals. The Court finds that they have chosen not to exercise any
5 further right to discovery or conduct any investigation beyond that already
6 performed. The Court finds that the Parties each understand that by failure to
7 engage in discovery either one may not fully appreciate the full extent of the assets
8 and debts of the Parties subject to the Court's jurisdiction or the character and
9 value of each asset and debt. The Court finds that each Party understands that this
10 lack of knowledge may mean that the division of community property is not equal,
11 that the level of support provided may be less than fully available under law, or that
12 either one may not have received the optimum settlement to which he or she is
13 entitled under California law.
14

15
16 **7.9 Trial and Judgment Relief Waivers.** With regard to this Judgment, the
17 Court finds that the Parties waive a statement of decision, the right to a new trial,
18 the right to petition for a rehearing, the right to appeal, and any rights under the
19 Soldiers' and Sailors' Civil Relief Act of 1940, as amended.
20

21
22 **SECTION 8: ATTORNEY REPRESENTATION AND FEES**
23

24 **8.1 Attorney Representation.** This Judgment has been negotiated and prepared
25 by Marian L. Stanton with Stanton Law Corporation, an attorney at law duly
26 licensed to practice in the State of California, who is representing Petitioner in
27 connection with this Judgment and proceeding for dissolution of marriage.
28

Stanton *AKS*

1 Respondent has been informed that Marian L. Stanton has acted solely as counsel
2 for Petitioner, did not advise or represent Respondent in this settlement, and owes
3 no legal duty to Respondent. Respondent has been strongly advised to seek the
4 advice of independent counsel in this matter. Nevertheless, he has chosen to
5 waive the right to independent counsel and to represent himself. He enters into
6 this waiver knowingly, intelligently, and voluntarily, and expressly acknowledges
7 that this waiver may affect any ability to set aside the Judgment.
8

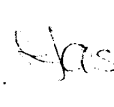
9
10 **8.2 Attorney's Fees.** Each Party is Ordered to pay his or her own attorney's fees
11 and costs incurred in the negotiation and preparation of this Judgment. The Court
12 finds that each Party has expressly waived any right to ask the Court for an award
13 of attorney's fees or costs through the entry of this Judgment.
14

15
16 **SECTION 9: TAX MATTERS**

17 **9.1 Parties' Understanding of Joint and Several Liability.** The Court finds
18 that the Parties recognize that the allocation between them of the responsibility for
19 the payment of taxes on joint income tax returns (as set forth in this Judgment) is
20 not binding on the Internal Revenue Service, the Franchise Tax Board (unless a tax
21 clearance certificate under Revenue and Taxation Code section 19006 has
22 previously been issued), or any other taxing authority. The Parties are aware that
23 if either Party fails to pay the taxes for which he or she is responsible, the law may
24 give the taxing authority power to collect these taxes from the other Party.
25

26
27 **9.2 Indemnification and Enforcement.** If the anticipated deductibility,
28 taxability, or tax allocation of any item in this Judgment is not accepted by a taxing

1 authority, the Party benefitting from that determination, to the extent of any
2 benefit, shall indemnify and hold harmless the other Party from all expenses and
3 liabilities, including deficiencies, interest, penalties, and professional fees. If,
4 however, the action by the taxing authority results from the indemnifying Party's
5 taking a position inconsistent with this Judgment, the indemnification in the
6 preceding sentence shall not be limited to the benefit enjoyed. The Parties are
7 Ordered to report all income, losses, and deductions (or other taxable
8 consequence) to the appropriate taxing authorities in a manner consistent with this
9 Judgment. A Party responsible for payment of taxes or filing a return who fails to
10 perform those responsibilities or comply with the tax provisions of this Judgment is
11 Ordered to indemnify and hold harmless the other Party from all liabilities and
12 expenses so incurred, including, without limitation, all deficiencies, interest,
13 penalties, and professional fees. Each Party also is Ordered to be solely responsible
14 for, and shall indemnify and hold harmless the other Party from, all such liabilities
15 and expenses associated with his or her failure to report any separate property
16 income or improper deductions claimed with respect to periods after the Separation
17 Date. The Court finds that the Parties agree that any indemnification payment from
18 one Party to the other, with respect to taxes, shall be deemed a tax-free
19 interspousal transfer related to the cessation of marriage to effect a division of
20 marital property under Internal Revenue Code section 1041 and comparable
21 provisions of state law, regardless of the date on which the payment is made. The
22 Court reserves jurisdiction to enforce the allocations set forth in this Judgment,
23 including, without limitation, granting to either Party a security interest in the
24 property of the Party who is responsible for the unpaid taxes.
25
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1 **9.3 Dependent Tax Exemption.** Petitioner shall be entitled to claim the minor
2 child of the Parties as a dependent on federal and state income tax returns filed
3 hereafter. A Party releasing an exemption to the other is Ordered to promptly
4 execute, upon the other Party's request, any documents necessary to confirm the
5 allocation of the dependent's exemption according to this provision, including,
6 without limitation, Internal Revenue Service Form 8332. The Court retains
7 jurisdiction to modify this provision.
8

9
10 **9.4 Tax Basis.** The Court finds that the Parties agree that under Internal
11 Revenue Code section 1041, or the tax principles regarding interspousal division of
12 community property, the allocation of property between the Parties under this
13 Judgment is not taxable, and the tax basis of each asset allocated under these
14 provisions has not changed, and will not change, by reason of this division. Each
15 Party is Ordered not to seek a new tax basis for any asset grounded on any such
16 change even though the transaction may otherwise appear to be a bona fide sale.
17

18 **9.5 Separate Tax Returns.** The Court finds that the Parties acknowledge that a
19 joint tax return of the Parties may not be filed for the year in which the judgment of
20 dissolution of marriage terminating marital status is obtained. Each Party is
21 Ordered to report on his or her own return one-half of any community property
22 income (including earnings from personal services rendered prior to the Separation
23 Date) and income or gain from separate property. Each Party will be entitled to
24 credits for one-half of any tax withholdings from the community income and for
25 one-half of any estimated taxes paid from his or her respective community property
26 (including overpayments from the prior year credited to taxes for such year), plus
27 all estimated taxes paid from separate property, plus all estimated and withheld
28

1 taxes from his or her separate property and separate income. Each Party shall
2 include all income from his or her separate property and all income from his or her
3 earnings from personal services earned after the Separation Date. Each Party shall
4 take the deductions to which he or she is entitled; any deductions attributable to
5 community investments or payments from community funds shall be divided
6 equally. The Parties are Ordered to exchange information with each other that is
7 necessary or helpful to the other in preparing the separate returns on a prompt
8 basis, but by no later than March 15th of the year following the tax year for which
9 returns will be filed. Each Party shall be solely liable for the taxes due on his or her
10 respective returns, and each shall be solely entitled to any refunds paid.
11

12
13 **9.6 Audit of Joint Tax Returns.** With respect to periods during the marriage,
14 the Parties have filed (or will file) joint federal and state income tax returns. If any
15 of those returns is audited, or if deficiencies or refunds arise for any other reason,
16 the audit and allocation of deficiencies or refunds shall be governed by this Section
17 9.6. Each Party is Ordered to immediately provide written notice, and shall forward
18 a copy, to the other Party of any statutory notice of deficiency (90-day letter), or
19 any other communication from any taxing authority regarding tax liabilities of either
20 Party attributable to joint returns for periods during the marriage. The Parties are
21 Ordered to cooperate fully with each other, are Ordered to execute all documents
22 reasonably requested by the other, and are Ordered to furnish information and
23 testimony necessary to respond to the action asserted by the taxing authority. If a
24 deficiency is to be paid, or a refund to be received, the tax liability of both Parties
25 shall be apportioned between the Parties in the same proportion that each Party's
26 respective liability on a married-filing-separately basis bears to the total of both
27
28

1 Parties' liabilities on a married-filing-separately basis whether or not either Party
2 decides to contest any assessment. The Parties shall likewise share on the same
3 basis any refunds arising from joint federal or state tax returns, after paying any
4 professional fees and costs incurred in obtaining the refund. Each Party shall pay,
5 on a timely basis, any additional tax to the extent that his or her allocated share of
6 the joint tax liability is greater than his or her share of taxes previously paid. Each
7 Party shall share in any refund to the extent that his or her share of taxes
8 previously paid exceeds his or her allocated share of the joint tax liability.
9

10 **9.7 Married-Filing-Separately Basis.** Any provision in this SECTION 9 adjusting
11 tax liability on a "married-filing-separately" basis shall mean that each Party shall
12 share in the obligation or claim based on the ratio that his or her separate tax
13 liability bears to the total of both Parties' separate tax liabilities had the Parties filed
14 separate tax returns for the calendar year(s) in question. In computing the Parties'
15 separate taxes, each Party shall be credited with all deductions that flow from
16 separate property income and assets, and deductions that are personal to that
17 Party (including, without limitation, interest on home loans, taxes, contributions,
18 and medical expenses). Tax deductible expenses and credits, including prior
19 payments of tax, not clearly attributable to the separate property of either Party,
20 shall be shared equally. Refunds attributable to loss carrybacks from periods after
21 the Separation Date shall belong solely to the Party whose post-separation
22 transactions generated the loss. Interest to be received and penalties and interest
23 to be paid shall be allocated in proportion to the allocation of the refund or the
24 deficiency. If the Parties are unable to agree on the allocation, the allocation shall
25 be determined with finality by an attorney or accountant agreeable to the Parties,
26
27
28

1 or, if they cannot agree, by the Court, for which purpose the Court retains
2 jurisdiction.

3 **SECTION 10: RESERVATION OF JURISDICTION.** The Court retains jurisdiction
4 (except as otherwise provided in this Judgment) to make orders and
5 determinations that are necessary and/or appropriate (i) to enforce any of the
6 terms of this Judgment or otherwise effectuate the division of property as specified
7 in the Judgment; (ii) to resolve any matter subject to the jurisdiction of the Court
8 that has not otherwise been resolved by the terms of the Judgment, or to resolve
9 any dispute that may arise concerning the terms of the Judgment; and (iii) to
10 resolve claims regarding omitted or undisclosed property and obligations.
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13
14 **SECTION 11: RECONCILIATION.** Any reconciliation between the Parties shall
15 not cancel, terminate, modify, or waive any provisions of this Judgment, unless the
16 Parties so agree in writing. However, nothing in this subsection shall be construed
17 to waive either Party's rights in community property accrued after a reconciliation.
18
19

20 **SECTION 12: QUASI-COMMUNITY PROPERTY.** Whenever community property
21 is referred to in this Judgment, it is understood that it includes quasi-community
22 property to the extent that such property exists.
23
24

25 **SECTION 13: NOTICES.** Any notice under this Judgment must be in writing and
26 shall be effective upon delivery by hand or three (3) business days after deposit in
27 the United States mail, postage prepaid, certified or registered, and addressed to
28

1 Respondent or to Petitioner at the address appearing with his or her name at the
2 top of this Judgment. Either Party shall be obligated to notify the other in writing of
3 any change in his or her address. Notice of change of address shall be effective
4 only when done in accordance with this Section.
5

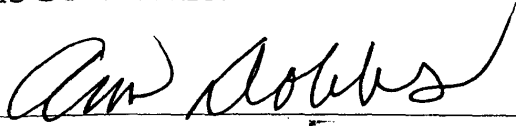
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7 **SECTION 14: ENTIRE AGREEMENT.** This Judgment is intended to be the final,
8 complete, and exclusive agreement of the Parties on the matters it covers. It
9 supersedes any previous or contemporaneous oral or written agreements between
10 the Parties with respect to these matters. There are no representations,
11 warranties, promises, or agreements with respect to these matters, except as set
12 forth in this Judgment.
13

14
15 **SECTION 15: SEVERABILITY.** If a court holds any provision of this Judgment to
16 be invalid, unenforceable, or void, the remainder of this Judgment shall remain in
17 full force and effect.
18

19 **SECTION 16: INTERPRETATION.** This Judgment shall be construed as a whole,
20 according to its fair meaning, and not in favor of or against any Party. For
21 example, no provision shall be construed in favor of the Party receiving a benefit
22 nor against the Party responsible for any particular language. Section headings are
23 used for reference purposes only and should be ignored in the interpretation of the
24 Judgment.
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IT IS SO ORDERED.



DATED: 5/10/01

JUDGE/JUDGE PRO TEMPORE **ANN DOBBS**

ANN DOBBS

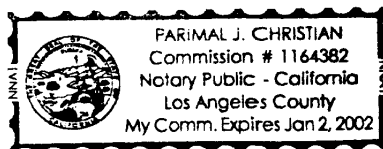
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STATE OF CALIFORNIA)
COUNTY OF Los Angeles

On October 28, 2001, 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

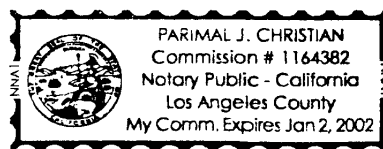


STATE OF CALIFORNIA)
COUNTY OF Los Angeles

On October 28, 2001, 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

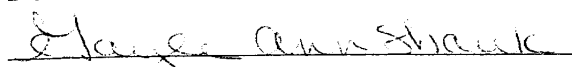


1 **SECTION 17: EXECUTION OF DOCUMENTS.** Each Party is Ordered, at the
2 request of the other, to execute and deliver any instrument, furnish any
3 information, and perform any other act reasonably necessary to carry out the
4 provisions of this Judgment without undue delay or expense. Any Party who fails to
5 comply with this Section is Ordered to reimburse the other Party for any reasonable
6 expenses, including attorney's fees and court costs, that as a result of this failure
7 become reasonably necessary to carry out the terms of this Judgment.
8

9
10 **SECTION 18: ACKNOWLEDGMENTS.** The Court finds that each Party
11 acknowledges that he or she respectively (i) is fully informed as to the facts
12 relating to the subject matter of this Judgment, and as to the rights and liabilities of
13 both Parties; (ii) enters into this Judgment voluntarily, free from fraud, undue
14 influence, coercion, or duress of any kind; and (iii) has read, considered, and
15 understands each provision of this Judgment.
16

17 THE PARTIES APPROVE AS TO FORM AND CONTENT:

18 
19 _____ DATED: 10-28-00
20 DONALD HERBERT SHANK

21 
22 _____ DATED: 10-28-00
23 GAYLE ANN SHANK

24 Approved as to Form :

25 
26 _____ DATED: 4-27-01

27 Marian L. Stanton
28 Attorney for GAYLE ANN SHANK

377

NAME AND ADDRESS OF SENDER: MARIAN L. STANTON STANTON LAW CORPORATION 16530 Ventura Blvd. Suite 205 Encino, California 91436-4589 Insert name of court, judicial district or 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	TELEPHONE NO: 818-906-2877 St.Bar #98007 For Court Use Only: FILED LOS ANGELES SUPERIOR COURT MAY 10 2001 JOHN A. CLARKE, CLERK. <i>Carmen Mehauffie</i> BY CARMEN MEHAUFFIE, DEPUTY		
DEFENDANT: DONALD HERBERT SHANK			
<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 60%; text-align: center; font-weight: bold;">NOTICE AND ACKNOWLEDGMENT OF RECEIPT</td> <td style="width: 40%; padding: 2px;"> Case Number: BD 332896 </td> </tr> </table>		NOTICE AND ACKNOWLEDGMENT OF RECEIPT	Case Number: BD 332896
NOTICE AND ACKNOWLEDGMENT OF RECEIPT	Case Number: BD 332896		

DONALD HERBERT SHANK
TO:
(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
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. ☒ A copy of the summons and of the Petition (Marriage) and: FL Cover Sheet/Conf.Counseling
- ☒ Blank Confidential Counseling Statement (Marriage)
- ☐ Order to Show Cause (Marriage)
- ☐ Blank Responsive Declaration
- ☐ Blank Financial Declaration
- ☒ 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)

378

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address): MARIAN L. STANTON 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 MAY 10 2001 JOHN A. CLARKE, CLERK. <i>Carmen Mehaffie</i> 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 ☒ Preliminary ☐ Respondent's ☒ Final		
		CASE NUMBER: BD 332896

1. I am the ☒ Petitioner ☐ Respondent in this matter.
2. ☒ My Preliminary Declaration of Disclosure and Income and Expense Declaration was served on:
☐ Petitioner ☒ Respondent by: ☒ personal service ☐ mail ☒ other (specify):
 on (date):
3. ☒ My Final Declaration of Disclosure and Income and Expense Declaration was served on:
☐ Petitioner ☒ Respondent by: ☒ 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.

379

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address):		FOR COURT USE ONLY	
TELEPHONE NO.: ATTORNEY FOR (Name): 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		FILED LOS ANGELES SUPERIOR COURT MAY 10 2001 JOHN A. CLARKE, CLERK. <i>Carmen Mehaffie</i> BY CARMEN MEHAFFIE, DEPUTY	
DECLARATION REGARDING SERVICE OF DECLARATION OF DISCLOSURE AND INCOME AND EXPENSE DECLARATION ☐ Petitioner's ☒ Respondent's		CASE NUMBER: BD 332896 ☒ Preliminary ☒ Final	

1. I am the ☐ Petitioner ☒ Respondent in this matter.
2. ☒ My Preliminary Declaration of Disclosure and Income and Expense Declaration was served on:
☒ Petitioner ☐ Respondent by: ☒ personal service ☒ mail ☐ other (specify):
 on (date): 3-28-01
3. ☒ My Final Declaration of Disclosure and Income and Expense Declaration was served on:
☒ Petitioner ☒ Respondent by: ☒ personal service ☒ 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.

380

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address): MARIAN L. STANTON STANTON LAW CORPORATION 530 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 MAY 10 2001 JOHN A. CLARKE, CLERK. <i>Carmen Mehauffie</i> BY CARMEN MEHAUFFIE, 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. ☒ 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. ☒ The parties stipulate that this cause may be tried as an uncontested matter.
5. ☒ 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. ☒ 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. ☒ A stipulation for judgment will be submitted to the court at the uncontested proceeding.
9. ☒ 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)

1282.50
 CASE NO. 332896
 DATE PAID: 05/08/01
 381

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address):

MARIAN L. STANTON

STANTON LAW CORPORATION

16530 Ventura Blvd.

Los Angeles, California 91436-4589

TELEPHONE NO.: 818-906-2877

FAX NO.: 818-501-2021

ATTORNEY FOR (Name): Gayle Ann Shank

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

FOR COURT USE ONLY

FILED
LOS ANGELES SUPERIOR COURT

MAY 10 2001

JOHN A. CLARKE, CLERK.
Carmen Mehaffie
BY CARMEN MEHAFFIE, DEPUTY

DECLARATION FOR DEFAULT OR UNCONTESTED

☒ 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 ☒ 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. ☒ 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. ☒ The parties have entered into an ☐ AGREEMENT or ☒ 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. ☒ 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. ☒ 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):
- ☐ Spousal support should be ordered as set forth in the proposed *Judgment (Family Law)*.
- ☐ Family support should be ordered as set forth in the proposed *Judgment (Family Law)*.

382

(Continued on reverse)



SUMMONS — FAMILY LAW CITACION JUDICIAL - DERECHO DE FAMILIA

NOTICE TO RESPONDENT (Name): DONALD HERBERT SHANK
VISO AL DEMANDADO (Nombre):

You are being sued. A usted le estan demandando.

PETITIONER'S NAME IS: GAYLE ANN SHANK
EL NOMBRE DEL DEMANDANTE ES:

CASE NUMBER: (Número del caso)
BD332896

FOR COURT USE ONLY
 (SOLO PARA USO DE LA CORTE)

FILED
 LOS ANGELES SUPERIOR COURT

MAY 10 2001

JOHN A. CLARKE, CLERK.
Carmen Mehauffe
 BY CARMEN MEHAUFFE, DEPUTY

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.

NOTE 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

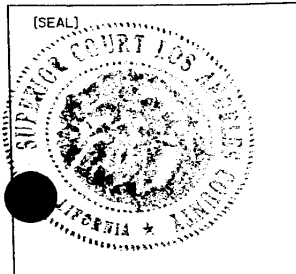
2. The name, address, and telephone number of petitioner's attorney, or petitioner without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es)
 818-906-2877
 MARIAN L. STANTON
 STANTON LAW CORPORATION
 16530 Ventura Blvd.
 Encino, California 91436-4589

OCT 18 2000

JOHN A. CLARKE, CLERK
[Signature]

(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 416.70 (ward or conservatee)

c. ☐ by personal delivery on (date):

☐ CCP 416.90 (individual)

☐ other:

(Read the reverse for important information)

(Lea el reverso para obtener información de importancia)

383

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

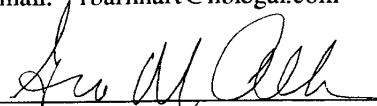
Means of Service

- ☐ facsimile
- ☐ Email
- ☒ U.S. Mail, Postage Prepaid (to Mr. Barnhart)
- ☐ Overnight Courier
- ☒ 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



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 from 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".

Mr. Donald Shank
May 14, 2002
Page 2

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

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.

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:

Page 83

- 2 Q. [By George Allen] So you have a document that, I presume,
3 will be identified in your disclosures that will
4 tell us the cost of rehabilitation and
5 reestablishment of this right-of-way so that it can
6 carry train traffic?
7 A. [By Donald Shank] Yes.

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 ^{was} ~~would~~ 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, ^(its) 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:

<u>Exhibit</u>	<u>Date</u>	<u>Description of Exhibit</u>
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

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 can be considered under the OFA procedures of section 10905. Abandonment of R.Lines

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

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

6 Q. (By Mr. Allen) That means as of this moment, while you
7 contemplate an undertaking to rehabilitate the rail
8 line, you don't have any specific knowledge as to
9 what freight may be shipped over it; is that fair to
10 say?

11 A. (By Mr. Shank) Correct, that's fair to say.

12 Q. You don't have any knowledge as to what
13 the revenue yield from shipping any such freight
14 might be?

15 A. We have not established it at this
16 time.

17 Q. Does the Foundation have any tariffs on
18 file with the STB, Surface Transportation Board,
19 with regard to freight shipment at the present time?

20 A. Not at this time.

21 Q. Has the Foundation done anything toward
22 development of filing of tariffs?

23 A. Not at this time.

24 Q. Has the Foundation contracted with,
25 hired, interviewed, or otherwise communicated with

Page 18

1 any person who has special knowledge or expertise
2 with regard to formulating freight tariffs?

3 A. Not at this time.

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.

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 Denver & Rio Grande Railway Historical Foundation		3. ADDITIONAL SPONSORS OR CO-SPONSORS Town Of South Fork	
4. CONTACT PERSON Don Shank		TITLE President	PHONE (970) 259-9498
5. AGENCY MAILING ADDRESS 1474 Main Avenue, Suite 223		CITY Durango	STATE CO ZIP 81301-5182

PROJECT DESCRIPTION

6. PROJECT NAME Denver & Rio Grande Historic Railway Rehabilitation Project		
7. PROJECT LOCATION/ADDRESS South Fork, Colorado		8. PROJECT LIMITS (mileposts, intersecting roadways, rivers, other geographic features) To Creede, Colorado
9. COUNTY Rio Grande/Mineral	10. MUNICIPALITY South Fork	11. PROJECT LENGTH 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	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
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	ENVIRONMENTAL MITIGATION ☐ Mitigation of water pollution due to highway runoff ☐ Reduction of vehicle-caused wildlife mortality

FUNDING

14. TOTAL PROJECT COST \$8,094,240.00	15. AMOUNT OF FEDERAL FUNDS REQUESTED \$6,475,392.00 <i>too high</i>	16. PREVIOUS ENHANCEMENT FUNDS AWARDED None
17. AMOUNT OF LOCAL MATCH FUNDS \$1,618,848.00	18. SOURCE OF LOCAL MATCH FUNDS D&RG Historical Foundation	19. DATE LOCAL MATCH FUNDS ARE AVAILABLE November 2001
20. AMOUNT OF OTHER FUNDING SECURED None	21. SOURCE OF OTHER FUNDING N/A	22. DATE OTHER FUNDING IS AVAILABLE 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 Don Shank	TITLE President
5. SIGNATURE <i>Don Shank</i>	DATE 06-14-02

CDOT USE ONLY

DOT RTD OR DESIGNEE/TITLE/DATE	STP #	PROJECT #
TRANSPORTATION ENHANCEMENT PROGRAM MANAGER/TITLE/DATE	PROJECT NAME	
DOT 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

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 Denver & Rio Grande Railway Historical Foundation		3. ADDITIONAL SPONSORS OR CO-SPONSORS Town Of South Fork	
4. CONTACT PERSON Don Shank		TITLE President	PHONE (970) 259-9498
5. AGENCY MAILING ADDRESS 1474 Main Avenue, Suite 223		CITY Durango	STATE CO ZIP 81301-5182

PROJECT DESCRIPTION

6. PROJECT NAME Denver & Rio Grande Historic Railway Rehabilitation Project		
7. PROJECT LOCATION/ADDRESS South Fork, Colorado		8. PROJECT LIMITS (mileposts, intersecting roadways, rivers, other geographic features) To Creede, Colorado
9. COUNTY Rio Grande/Mineral	10. MUNICIPALITY South Fork	11. PROJECT LENGTH 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	TRANSPORTATION AESTHETICS ☐ Acquisition of scenic easements & scenic areas ☐ Scenic highway programs ☐ Landscaping & other scenic beautification ☐ Provision of tourist & welcome center facilities ☐ Control & removal of outdoor advertising
HISTORIC PRESERVATION ☐ Acquisition of historic sites ☐ Scenic highway programs ☐ Historic preservation ☐ Establishment of transportation museums ☐ Rehabilitation & operation of historic transportation buildings, structures or facilities ☐ Archeological planning & research	ENVIRONMENTAL MITIGATION ☐ Mitigation of water pollution due to highway runoff ☐ Reduction of vehicle-caused wildlife mortality

FUNDING

4. TOTAL PROJECT COST \$2,075,500.00	15. AMOUNT OF FEDERAL FUNDS REQUESTED \$1,660,400.00 <i>too high</i>	16. PREVIOUS ENHANCEMENT FUNDS AWARDED None
7. AMOUNT OF LOCAL MATCH FUNDS \$415,100.00	18. SOURCE OF LOCAL MATCH FUNDS D&RG Historical Foundation	19. DATE LOCAL MATCH FUNDS ARE AVAILABLE November 2001
10. AMOUNT OF OTHER FUNDING SECURED None	21. SOURCE OF OTHER FUNDING N/A	22. DATE OTHER FUNDING IS AVAILABLE N/A

REQUIRED INFORMATION

1. 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 Don Shank	TITLE President
SIGNATURE <i>[Signature]</i>	DATE 06-14-02

CDOT USE ONLY

CDOT PROJECT 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

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 Denver & Rio Grande Railway Historical Foundation		3. ADDITIONAL SPONSORS OR CO-SPONSORS Town Of South Fork	
4. CONTACT PERSON Don Shank		TITLE President	PHONE (970) 259-9498
5. AGENCY MAILING ADDRESS 1474 Main Avenue, Suite 223		CITY Durango	STATE CO
		ZIP 81301-5182	

PROJECT DESCRIPTION

6. PROJECT NAME Denver & Rio Grande Historic Railway Rehabilitation Project		
7. PROJECT LOCATION/ADDRESS South Fork, Colorado		8. PROJECT LIMITS (mileposts, intersecting roadways, rivers, other geographic features) To Creede, Colorado
COUNTY Rio Grande/Mineral	10. MUNICIPALITY South Fork	11. PROJECT LENGTH 21 Miles
9. ONE SENTENCE DESCRIPTION OF PROJECT Construct a Railroad Maintenance Facility		

ELIGIBILITY

3. PROJECT CATEGORY - check all that apply	
PEDESTRIAN & BICYCLE ☐ Bicycle & pedestrian facilities ☐ Safety & educational activities for pedestrians & bicycles ☐ Conversion of abandoned railway corridors to trails	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
STORIC PRESERVATION ☐ Acquisition of historic sites ☐ Scenic highway programs ☐ Historic preservation ☐ Establishment of transportation museums ☐ Rehabilitation & operation of historic transportation buildings, structures or facilities ☐ Archeological planning & research	ENVIRONMENTAL MITIGATION ☐ Mitigation of water pollution due to highway runoff ☐ Reduction of vehicle-caused wildlife mortality

FUNDING

TOTAL PROJECT COST \$125,650.00	15. AMOUNT OF FEDERAL FUNDS REQUESTED \$100,520.00	16. PREVIOUS ENHANCEMENT FUNDS AWARDED None
AMOUNT OF LOCAL MATCH FUNDS \$25,130.00	18. SOURCE OF LOCAL MATCH FUNDS D&RG Historical Foundation	19. DATE LOCAL MATCH FUNDS ARE AVAILABLE November 2001
AMOUNT OF OTHER FUNDING SECURED None	21. SOURCE OF OTHER FUNDING N/A	22. DATE OTHER FUNDING IS AVAILABLE N/A

REQUIRED INFORMATION

REQUIRED ATTACHMENTS - please label attachments accordingly	
Attachment A - Description of proposed project	☒ Attachment F - Budget and implementation schedule
Attachment B - Maps, plans and photographs	☒ Attachment G - Proposed maintenance plans, agreements, covenants
Attachment C - Evidence of eligibility by project category	☒ Attachment H - Resolutions of support and letters of approval
Attachment D - Benefits of proposed project	☒ Attachment I - Right-of-way acquisition or legal property description
Attachment E - Environmental Review	

SIGNATURE

AUTHORIZED AGENCY REPRESENTATIVE Don Shank	TITLE President
SIGNATURE 	DATE 06-14-02

CDOT USE ONLY

STIP OR DESIGNEE/TITLE/DATE	STIP #	PROJECT #
TRANSPORTATION ENHANCEMENT PROGRAM MANAGER/TITLE/DATE	PROJECT NAME 407	
RESIDENT OR PROGRAM ENGINEER/TITLE/DATE	☐ Approved ☐ Disapproved	

Mail 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 Denver & Rio Grande Railway Historical Foundation		3. ADDITIONAL SPONSORS OR CO-SPONSORS Town Of South Fork	
4. CONTACT PERSON Don Shank		TITLE President	PHONE (970) 259-9498
5. AGENCY MAILING ADDRESS 1474 Main Avenue, Suite 223		CITY Durango	STATE CO ZIP 81301-5182

PROJECT DESCRIPTION

6. PROJECT NAME Denver & Rio Grande Historic Railway Rehabilitation Project		
7. PROJECT LOCATION/ADDRESS South Fork, Colorado		8. PROJECT LIMITS (mileposts, intersecting roadways, rivers, other geographic features) To Creede, Colorado
9. COUNTY Rio Grande/Mineral	10. MUNICIPALITY South Fork	11. PROJECT LENGTH 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
- ☐ 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 \$1,000,000.00	15. AMOUNT OF FEDERAL FUNDS REQUESTED \$800,000.00	16. PREVIOUS ENHANCEMENT FUNDS AWARDED None
17. AMOUNT OF LOCAL MATCH FUNDS \$200,000.00	18. SOURCE OF LOCAL MATCH FUNDS D&RG Historical Foundation	19. DATE LOCAL MATCH FUNDS ARE AVAILABLE November 2001
20. AMOUNT OF OTHER FUNDING SECURED None	21. SOURCE OF OTHER FUNDING N/A	22. DATE OTHER FUNDING IS AVAILABLE N/A

REQUIRED INFORMATION

13. REQUIRED ATTACHMENTS - please label attachments accordingly

- | | |
|--|---|
| ☒ Attachment A - Description of proposed project | ☒ Attachment F - Budget and implementation schedule |
| ☒ Attachment B - Maps, plans and photographs | ☒ Attachment G - Proposed maintenance plans, agreements, covenants |
| ☒ Attachment C - Evidence of eligibility by project category | ☒ Attachment H - Resolutions of support and letters of approval |
| ☒ Attachment D - Benefits of proposed project | ☒ Attachment I - Right-of-way acquisition or legal property description |
| ☒ Attachment E - Environmental Review | |

SIGNATURE

1. AUTHORIZED AGENCY REPRESENTATIVE Don Shank	TITLE President
2. SIGNATURE <i>Don Shank</i>	DATE 06-14-02

CDOT USE ONLY

DOT REQ OR DESIGNEE/TITLE/DATE	STIP #	PROJECT #
TRANSPORTATION ENHANCEMENT PROGRAM MANAGER/TITLE/DATE	PROJECT NAME 408	
DOT 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:

- Need more detailed descriptions*
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
- 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]
Date: Tuesday, September 24, 2002 12:05 PM
To: 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



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

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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,
Aurie

>

>

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

412
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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.

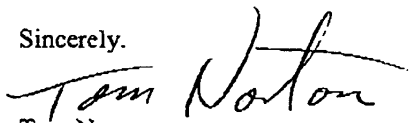
You have submitted four additional enhancement funding applications in the name of the Denver & Rio Grande Railway Historical Foundation, requesting over \$9 million in federal funding for track and bridge rehabilitation, maintenance facility construction, and purchase of right-of-way. Please again note 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

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
- ☒ Email to Mr. Micklewright
- ☒ U.S. Mail, Postage Prepaid
- ☐ Overnight Courier
- ☐ Hand Delivery

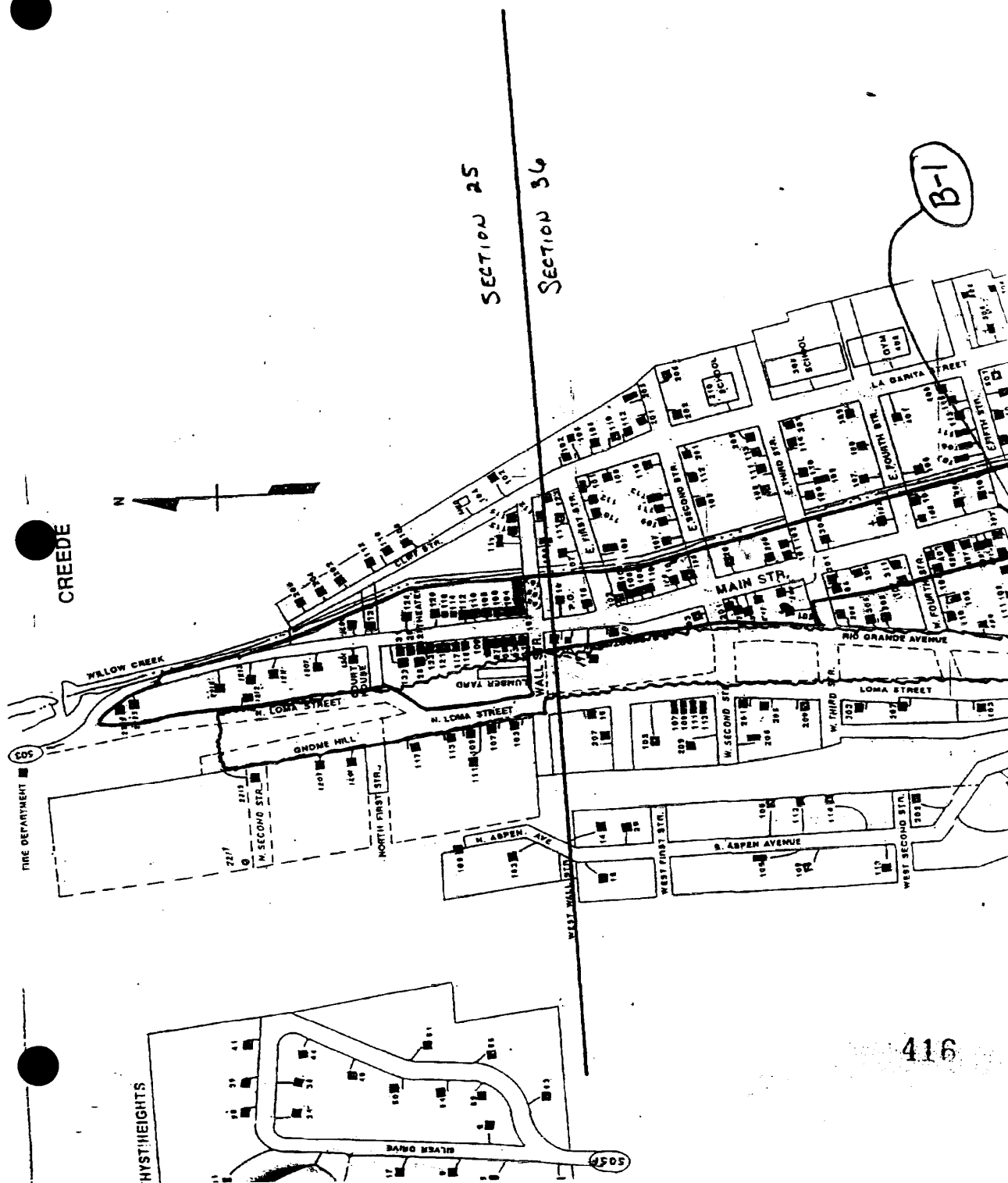
Counsel Served

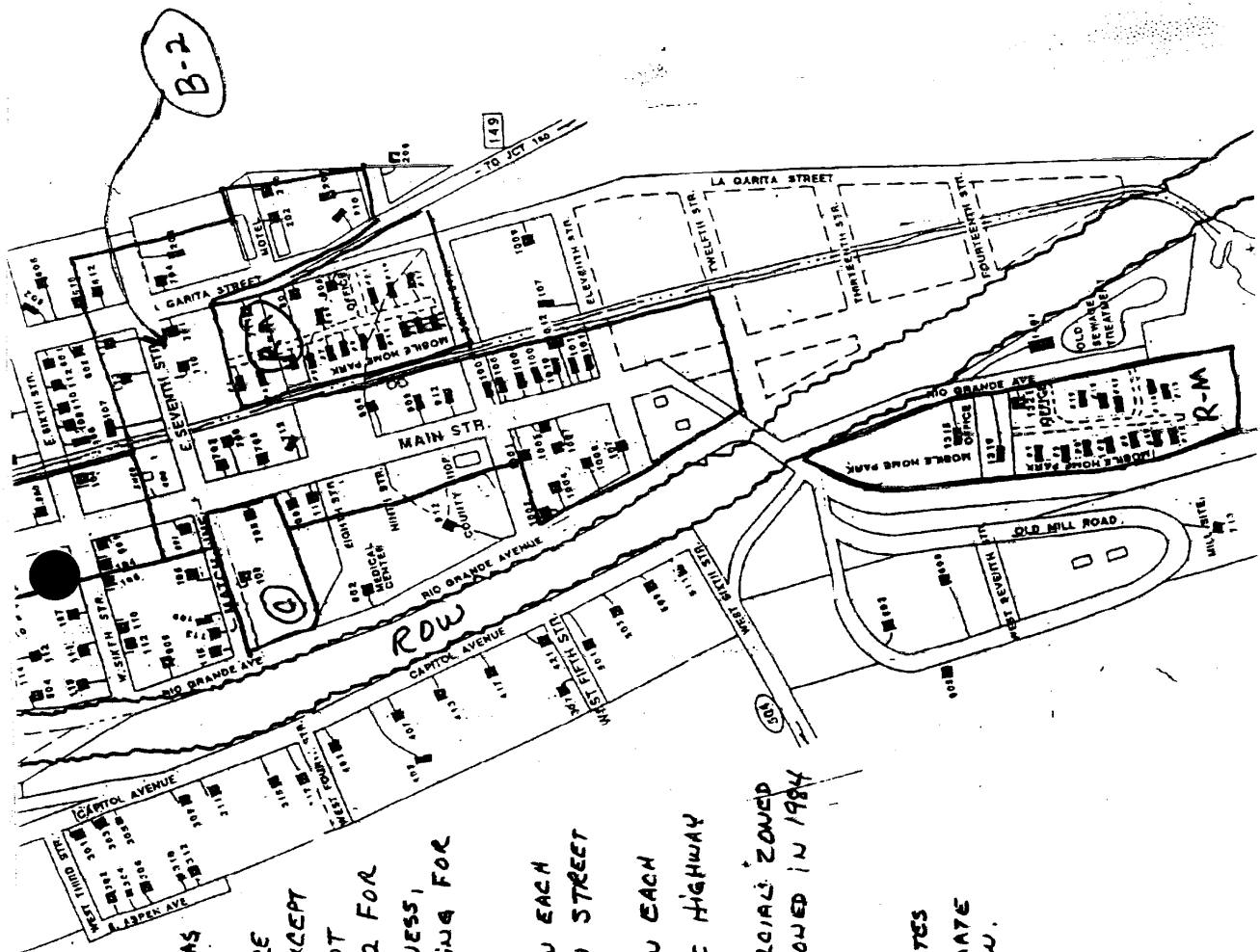
Raymond P. Micklewright, Esq.
WOLF & SLATKIN
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Suite 1000
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Telephone: 303-355-2999
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Telephone: 303-793-0700
Facsimile: 303-793-1950
Email: rbarnhart@hblegal.com


George M. Allen

d:\creede\157.mtn





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

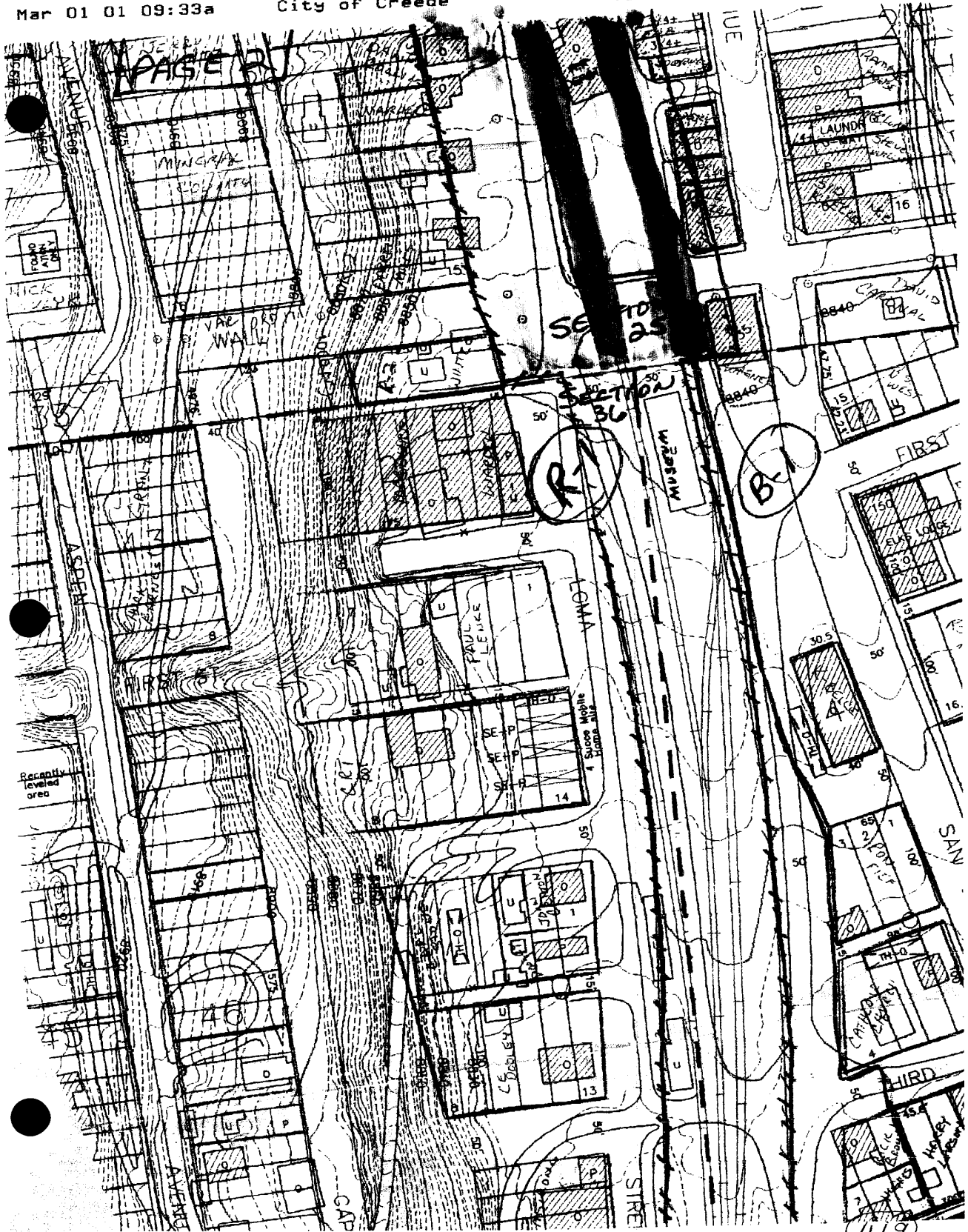
B-1 IS 50' ON EACH
SIDE OF MAIN STREET

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.

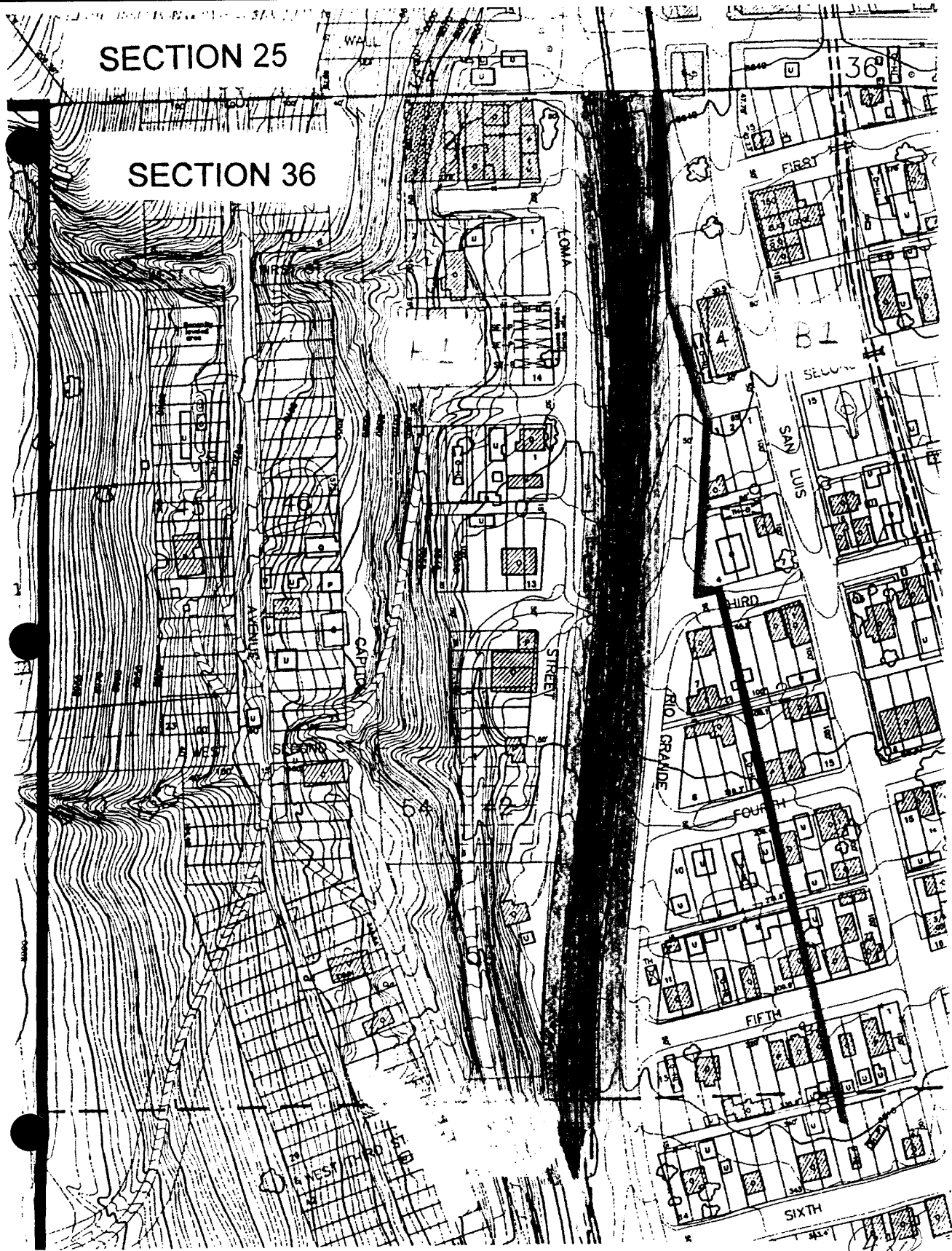


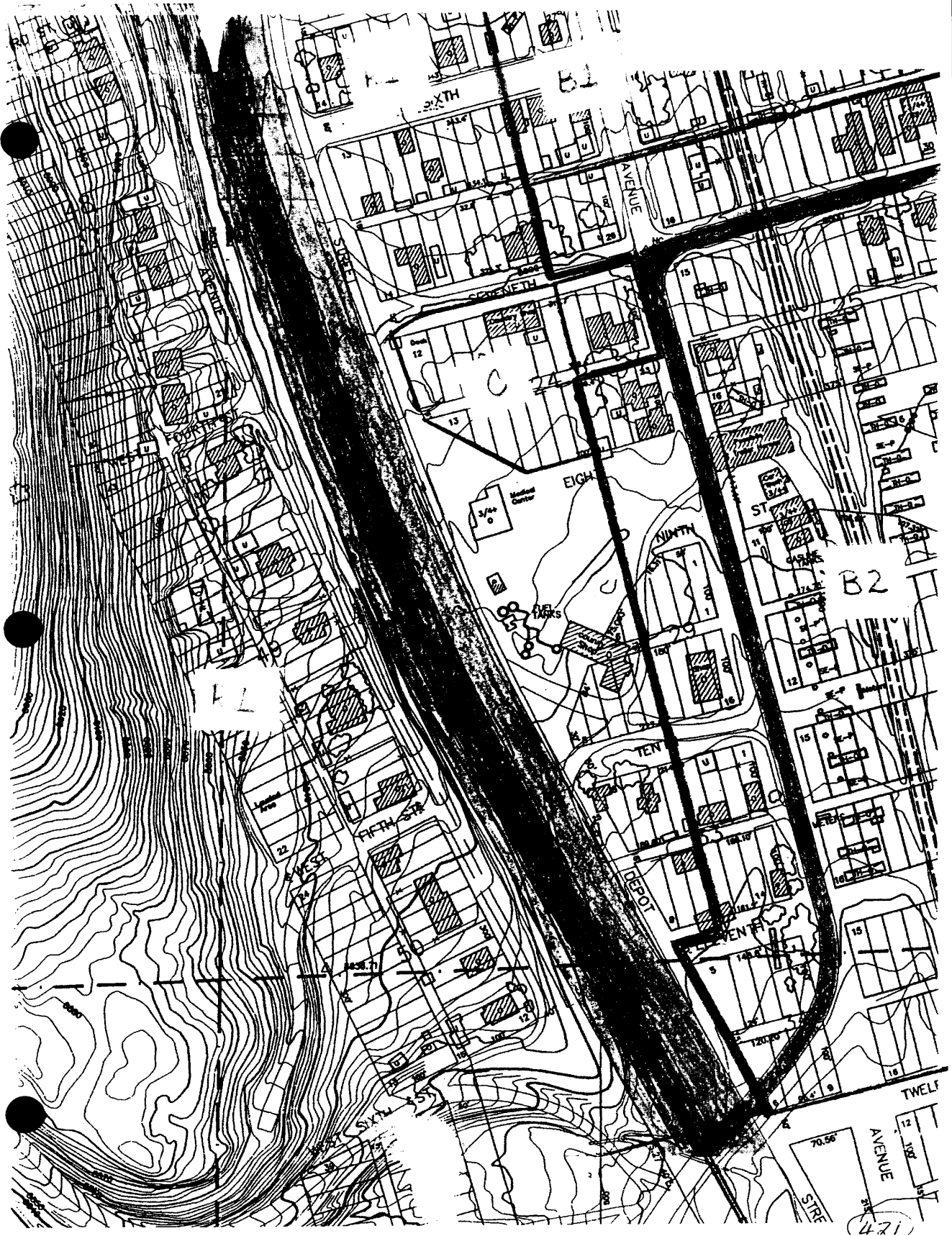


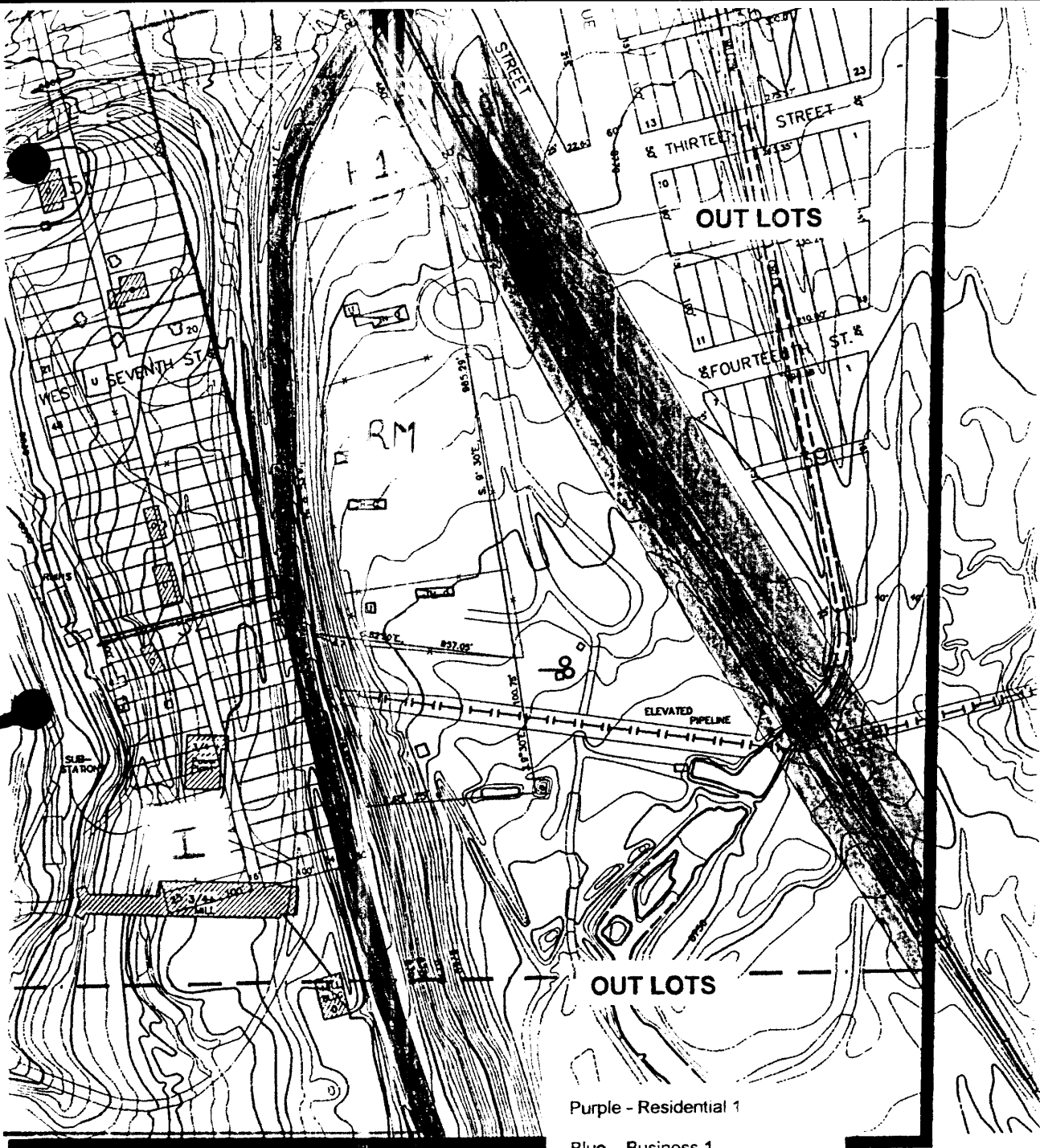
(419)

SECTION 25

SECTION 36







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