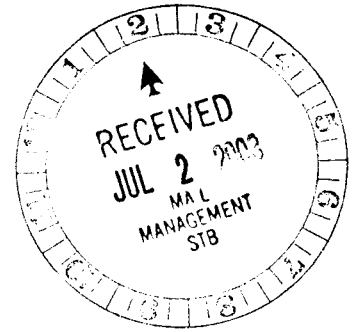


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208268

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July 2, 2003

FD 34376

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

Dear Secretary Williams:

This transmits the Petition for Declaratory Order of the City of Creede, Colorado.

Petitioner City of Creede is a municipality of the State of Colorado and hereby requests waiver of the filing fee pursuant to 49 CFR 1002.2(e)(1).

If you have any questions or need further information, please contact me at (970) 369-1000 or by cell phone at (970) 260-3895 or by email at alnoma@yahoo.com.

Yours very truly,

George M. Allen

FEE RECEIVED

JUN 2 - 2003

**SURFACE
TRANSPORTATION BOARD**

FILED

JUN 2 - 2003

**SURFACE
TRANSPORTATION BOARD**

Enclosure

Cc: Raymond P. Micklewright, Esq.

**ENTERED
Office of Proceedings**

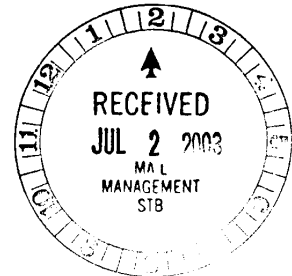
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**Part of
Public Record**

ORIGINAL

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. _____



CITY OF CREEDE'S PETITION FOR DECLARATORY ORDER

The City of Creede, Colorado, a Colorado Municipal Corporation, by its attorney, George M. Allen, submits the following Petition for a Declaratory Order addressing certain questions and issues referred to the Surface Transportation Board by the United States District Court for the District of Colorado pursuant to 28 U.S.C. §1336(b).

A. IDENTITY AND ADDRESSES OF THE PARTIES

The City of Creede is a Colorado municipality. Creede is the County Seat of Mineral County, Colorado and is situated at the northern terminus of the Creede Branch of the former Denver & Rio Grande Western Railroad. The address for the City of Creede is P.O. Box 457, Creede CO 81130. The City of Creede is the Plaintiff in Civil Action No. 01-RB-318 (CBS), the action from which the District Court has made the 28 U.S.C. §1336(b) referral. A copy of the Court's May 9, 2003 Rreferral Order is attached as Exhibit A.

The Defendants in the Colorado District Court action are the Denver & Rio Grande Historical Foundation, Inc. (the Foundation), a Colorado not-for-profit corporation, and Donald Shank, the Chief Executive Officer of the Foundation. The Foundation was awarded rights to acquire and operate the Creede Branch pursuant to an Offer of Financial Assistance in STB Docket No. AB-33 (Sub No. 132X) Union Pacific Railroad Company Abandonment Exemption in Rio Grande and Mineral Counties, Colorado. The address of the Foundation is 1474 Main Avenue, Suite 223, Durango, Colorado, 81301.

B. FACTUAL BACKGROUND

On November 7, 2000, Creede filed suit in the District Court of the State of Colorado for Mineral County, Colorado, asking that the Mineral County District Court issue a Declaratory Judgment and such injunctive relief as might be necessary to enforce Creede's residential zoning laws as to those parts of the Creede Branch right-of-way lying within the city limits of Creede and not in any active or historic use for railroad purposes. The state court suit followed announcements by the Foundation and the Foundation's Chief Executive Officer, Mr. Shank, that the Foundation planned to establish commercial enterprises on the right-of-way, including a restaurant and hotel facilities.

The Defendant Foundation removed the state court suit to the United States District Court for the District of Colorado. A motion for remand to state court was denied and the action proceeded in federal court.

In the OFA proceedings before the Surface Transportation Board, objections were raised to the award of OFA rights to the Foundation, stating that the Foundation did not have sufficient financial capability to purchase and restore freight rail operations on the Creede Branch.

The Creede Branch, when purchased by the Foundation, had been completely out of service since 1985 and no train operated to the town of Creede after 1973. The Creede Branch consists of 21.6 miles of trackage, laid in the 1880's and 1890's.

C. REQUEST FOR RELIEF

Creede seeks a Board decision addressing the following three questions referred by the District Court pursuant to 28 U.S.C. §1336(b):

- 1) Is the land in the outer portions of the Foundation's 100 feet wide railroad right-of-way in South Creede, Colorado, each of which is 37.5 feet wide, necessary for the safe and convenient use of the central portion of the right-of-way, which is 25 feet wide and which accommodates the tracks and side clearance on both sides of the tracks?
- 2) If the answer to question 1 is negative, are the City of Creede's zoning ordinances, which restrict the use of land in South Creede to residential purposes, applicable to the outer portions of the Foundation's 100 feet wide railroad right-of-way, each of which is 37.5 feet wide, or are these ordinances: i) federally preempted by 49 U.S.C. § 10501(b); and/or ii) invalidated because they conflict with the Commerce Clause of the United States Constitution?
- 3) If the answer to question 1 is affirmative, are the City of Creede's zoning ordinances, which restrict the use of land in South Creede to residential purposes, applicable to the outer portions of the Foundation's 100 feet wide railroad right-of-way, each of which is 37.5 feet wide, or are these ordinances: i) federally preempted by 49 U.S.C. § 10501(b); and/or ii) invalidated because they conflict with the Commerce Clause of the United States Constitution?

During the course of proceedings below, the District Court developed a factual record which casts substantial doubt on the validity of the evidence filed by the Foundation with the Board in STB Docket No. AB-33 (Sub-No. 132X).

By paragraph 7 of his May 9, 2003 Referral Order, and his contemporaneous May 9, 2003 Order for Receipt of Supplemental Materials, consisting of records of the Colorado Department of Transportation, in the District Court record, Judge Blackburn deferred to the jurisdictional competence of the Board with regard to the issues arising from the Board's OFA proceedings.

Creede will submit materials compiled in the District Court bearing upon both the §1336(b) issues defined by Judge Blackburn and the Board's jurisdictional competence referenced in paragraph 7 of Judge Blackburn's May 9, 2003 referral orders.

D. REQUEST FOR MODIFIED PROCEDURE

The City of Creede requests that this proceeding be conducted under the provisions of 49 C.F.R. Part 1112-Modified Procedures. The matters raised herein can be resolved through the submission of written statements and supporting materials, including materials from the records compiled by the District Court. A procedural schedule should be adopted giving the parties the opportunity to utilize discovery procedures available under 49 C.F.R. Part 1114 Subpart B.¹

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "G. M. Allen", is written over a horizontal line.

George M. Allen

¹ In the District Court proceedings, the Foundation urged that the District Court limit discovery, based on the position of the Foundation that discovery would be available in this proceeding under the rules established by the Board.

Certificate of Service

I hereby certify that I have served a true copy of the above Petition for Declaratory Order
by counsel for respondent, Denver & Rio Grande Railway Historical Foundations, Inc.

Raymond Micklewright, Esq.
Wolf & Slatkin
44 Cook Street
Denver, Colorado 80206
303() 355-2999



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Facsimile: (970) 369-1009

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Robert E. Blackburn, Judge

FILED
United States District Court
Denver, Colorado

MAY 9 2003

JAMES R. MANSPEAKER, CLERK
By _____
Deputy Clerk

Civil Case No. 01-RB-318 (CBS)

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 REFERRING QUESTIONS TO SURFACE TRANSPORTATION BOARD

Blackburn, J

This matter is before the court on the parties' proposed statements of issues to be referred to the Surface Transportation Board (STB). By this order, the questions stated below are referred to the STB pursuant to 28 U.S.C. § 1336(b).

Factual and Procedural Background

This case concerns a dispute over the defendants' rights to use lands which the defendants claim are included in a railroad right of way owned by defendant Denver & Rio Grande Railway Historical Foundation (Foundation). Defendant Donald Shank is the founder and principal operator of the Foundation. The railroad line is known as the Creede Branch.

A portion of the Creede Branch runs through the City of Creede, Colorado. In this case, the City of Creede seeks a declaratory judgment holding that the City of Creede's residential zoning regulations are applicable to all lands within the Foundation's railroad right-of-way which the foundation is not using for "freight railroad

activities or activities directly related to freight railroad activities." *Complaint*, ¶ 12. The City of Creede's complaint addresses only that portion of the right of way which runs through a part of the city known as South Creede. *Id.*

According to the Foundation, Creede's zoning and land use laws cannot lawfully be applied to its railroad right of way. *Answer*, p. 3. The Foundation argues that Creede's zoning and land use laws are preempted by 42 U.S.C. § 10501(b), concerning federal regulation of rail transportation. *Opposition to Motion to Remand*, filed April 2, 2001, pp. 5-8. In addition, the Foundation asserts that any interference with its exclusive possession and use of its right-of-way land violates the Commerce Clause of the U.S. Constitution. *Id.*, pp. 8-10.

The Foundation obtained rights to the railroad right of way when the Union Pacific Railroad published a notice of abandonment concerning the right of way. The defendants then came forward with an Offer of Financial Assistance (OFA) seeking to purchase the entire line. The STB approved the OFA and the Foundation was authorized to acquire the line. In May of 2002, the plaintiff sought to amend its complaint to add two additional claims. In its proposed second claim for relief, the city sought to challenge the validity of the STB's approval of the Foundation's OFA, which enabled the Foundation to acquire the Creede Branch. In its proposed third claim for relief, the city sought to challenge the rights of the Foundation under the OFA based on the city's claim that the Foundation does not have the ability to establish interstate freight rail service on the Creede Branch. *Proposed Amended Complaint*, filed May 1, 2002.

On October 16, 2002, I entered an order denying the city's motion to amend its complaint to add these two claims. I concluded that this court does not have jurisdiction to modify or set aside the STB's approval of the Foundation's OFA and the Foundation's acquisition of the rail line. In short, the only claim before the court is the City of Creede's claim concerning the applicability of its zoning ordinances to the Foundation's railroad right-of-way in South Creede.

The railroad right-of-way at issue here is 100 feet wide. At the center of the right-of-way is a 25 foot wide strip within which the tracks are centered. This 25 foot space, at times referred to as a clear space, accommodates the tracks and side clearance on both sides of the tracks. The balance of the right-of-way is made up of strips of land on both sides of the 25 foot clear space. Each of these strips is 37.5 feet wide. The City of Creede has indicated that it is not claiming that its zoning regulations in South Creede are applicable to the 25 foot clear space at the center of the right-of-way. Rather, the city claims its zoning regulations are applicable to the 37.5 foot strips on both side of the clear space. See, e.g, *brief in support of motion to remand*, filed March 1, 2001, p. 4; *Order*, filed May 8, 2001, p. 2. The city claims that these 37.5 foot strips are "not now being used for railroad-related purposes or activities and (have) never, in a span of over 110 years, been used for any railroad activity." *Brief in support of motion to remand*, filed March 1, 2001, p. 4. The city claims that its zoning regulations are applicable to these strips largely because they have never been used for railroad purposes.

Referral to Surface Transportation Board

The doctrine of primary jurisdiction is applicable to claims properly cognizable in court which contain some issue that is within the special competence of an administrative agency. *See, e.g., Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 304 - 06 (1976). Under the doctrine of primary jurisdiction, referral of a question to an administrative agency is appropriate when such a referral would help to ensure uniformity and consistency in the application of the regulatory scheme entrusted to the agency, or when the agency is better equipped to determine the issue in question because of the agency's specialization, experience, or procedures. *Nader*, 426 U.S. at 304. When a court refers an issue to an administrative agency under the doctrine, the court may stay its case to permit the parties a reasonable opportunity to seek an administrative ruling on the issue. *Reiter v. Cooper*, 507 U.S. 258, 268 - 69 (1993). In the alternative, the court may dismiss its case without prejudice, if the parties would not be unfairly disadvantaged. *Id.*

In this case the parties agree, and the court concurs, that the specialized knowledge of the STB is directly applicable to the questions at issue in the plaintiff's complaint and the defendants' answer. Most notably, 49 U.S.C. § 10501(b) provides for exclusive STB jurisdiction over remedies with respect to rail transportation and facilities of STB-authorized rail carriers. Section 10501(b) also provides that the provisions of § 10501 and related statutes preempt other remedies provided under state and federal law. The Foundation is an STB-authorized rail carrier and the issues presented by the plaintiff's complaint and the defendants' answer concern the City of

Creede's ability to regulate a portion of the railroad right-of-way which the foundation is authorized to use. These issues properly may be referred to the STB.

The plaintiff asks that the court also refer to the STB questions about the validity of the STB's approval of the Foundation's OFA and the rights of the Foundation under the OFA. Again, I concluded in my October 16, 2002, order that I do not have jurisdiction over these questions. Therefore, referral of these questions to the STB by this court is not appropriate.

THEREFORE IT IS ORDERED as follows:

1) That pursuant to 28 U.S.C. § 1336(b), this matter is referred to the United States Surface Transportation Board for determination of the questions specified below;

2) That this referral is made to give the parties a reasonable opportunity within which to apply to the Surface Transportation Board for a ruling as to the following three questions:

A) Is the land in the outer portions of the Foundation's 100 feet wide railroad right-of-way in South Creede, Colorado, each of which is 37.5 feet wide, necessary for the safe and convenient use of the central portion of the right-of-way, which is 25 feet wide and which accommodates the tracks and side clearance on both sides of the tracks?

B) If the answer to question A is negative, are the City of Creede's zoning ordinances, which restrict the use of land in South Creede to residential purposes, applicable to the outer portions of the Foundation's 100 feet wide railroad right-of-way, each of which is 37.5 feet wide, or are these ordinances: i) federally preempted by 49 U.S.C. § 10501(b); and/or ii) invalidated because they conflict with the Commerce Clause of the United States Constitution?

C) If the answer to question A is affirmative, are the City of Creede's zoning ordinances, which restrict the use of land in South Creede to residential purposes, applicable to the outer portions of the Foundation's 100 feet wide railroad right-of-way, each of which is 37.5 feet wide, or are these ordinances: i) federally preempted by 49 U.S.C. § 10501(b); and/or ii) invalidated because they conflict with the Commerce Clause of the United States Constitution?

3) That the clerk shall transmit a copy of this order to the Secretary of the Surface Transportation Board;

4) That the plaintiff shall initiate proceedings with the Surface Transportation Board seeking a determination of the questions listed above within 60 days from the date of this order;

5) That the parties shall provide the Surface Transportation Board with copies of documents from the record in this case which the parties consider relevant to the determinations to be made by the Surface Transportation Board;

6) That the parties shall provide the relevant portions of the record in this case to the Surface Transportation Board within 80 days of the date of this order, or as directed by the Surface Transportation Board;

7) That this order shall not be read to limit the authority of the Surface Transportation Board to address, outside of the scope of this referral, other issues over which the Board has authority;

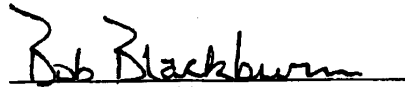
8) That the court shall retain jurisdiction of this case pending the Surface Transportation Board's review of the referred questions;

9) That this case shall be administratively closed, pursuant to D.C.COLO.LCivR 41.2; and

10) That the parties may, for good cause, move to reopen this case so that it may proceed to final disposition.

Dated this 8th day of May, 2003, at Denver, Colorado.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Bob Blackburn", is written over a horizontal line.

Robert E. Blackburn
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CERTIFICATE OF SERVICE

Civil Case No. 01-RB-318 (CBS)

The undersigned certifies that a copy of the foregoing Order was
served on May 9, 2003, by:

(X) delivery to:

Magistrate Judge Craig Shaffer

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

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Denver, CO 80206-5827

Secretary
Surface Transportation Board
1925 K St., NW
Washington, DC 20423-0001

J. B. Beck
Deputy Clerk